INFLUENCE OF PRECEDENTS IN SECURITY ISSUES ON THE DEVELOPMENT OF LAW

by

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Under the Direction of Susan Haire and John Maltese

ABSTRACT

As changes in society occur, cases and controversies pertaining to those societal changes enter the judicial system in the United States. The rulings in these cases become precedents which in turn affect the development of the law in our legal system. This research examines precedents from terrorism prosecutions to determine their impact on judicial policy in criminal procedure. Precedents from drug cases are used as a comparison data set. As precedents from terrorism and drug cases are established, they generate standards that are used in both criminal and non-criminal cases. This research examines the impact of those precedents on the development of the law.

INDEX WORDS: precedent, law, impact of judicial decisions, criminal procedure, terrorism, drug law

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DEDICATION

In loving memory of two people with whom I could never had completed my dissertation.

My father, Rev. Dr. Joseph A. Newton, whose love and support of me was without question and unceasing. I still miss you a great deal.

Dr. Susette Talarico, a tireless teacher and motivator. Dori Porter once said you had the ability to make every student feel like he or she was your favorite student. I certainly felt like I was your favorite student as did many others.

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TABLE OF CONTENTS

Page

LIST OF TABLES

Page

LIST OF FIGURES

Page

CHAPTER 1

INTRODUCTION

"[T]he exact nature of the legal rule established by a Supreme Court opinion can change over time…When Court opinions legally treat or interpret an existing precedent they shape it by restricting or broadening its applicability."

- Thomas Hansford & James Spriggs (2006, 5)

Introduction

The law of criminal procedures in the American judicial system is what the courts say it is. Rather than a book of rules and laws that are created by a legislative body or committee, the rules of criminal procedure are created case-by-case. A text book on criminal procedures for the 1960s will look very different from a modern one because changes in society require the court system to create rulings on new and unique issues. As our society changes, the criminal justice system faces new challenges about how to maintain order and what threats must be addressed by the government. The criminal justice system, including the courts, must adapt to these changes as new rulings and precedents are created in response to cases and controversies brought to the judicial system. This study will examine the development of law in the criminal justice system focusing on the impact of the rise of concerns about terrorism and terrorism prosecutions on the development of law. The research will use drug cases for comparison because they also pose security concerns. When cases with greater security concerns enter the court system how are their precedents used? Where are those precedents used and where

do they have the most influence? What influences a court to use one precedent over another?

Precedents from terrorism cases are likely to influence judicial policy. When the criminal justice system hears a case concerning a burglary or theft case, the judges and juries may have some concern about letting the suspect free to commit more crimes, but even if those concerns exist the concern does not pertain to their own personal safety. In terrorism cases, the suspects are often ideologically driven and the suspects are often willing to risk certain death to commit their crimes such as in the September 11, 2001 terrorist attacks. Judges may be reluctant to rule in favor of the defendant in terrorism cases because freeing the terrorist suspects may signal that the suspects are free to wage war against the United States. In his dissent in *Boumediene v. Bush*, Justice Scalia said the impact of that ruling would "almost certainly cause more Americans to be killed" (2008, 2294). By ruling in favor of the government in terrorism cases, judges create precedents that favor the government and can be used in regular criminal procedure cases. These precedents will pull judicial policy in a pro-government direction. Former Attorney General Michael Mukasey warned that precedents from the prosecution of terrorism cases "will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law (Mukasy 2007). An unanticipated and ironic consequence of the increase in the prosecution of terrorists in non-military courts is that providing terrorist suspects due process rights in civilian court may result in more restrictive judicial policy as it relates to the rights of ordinary criminal defendants.

The case of *Abu Ali* is illustrative of the influence and challenges to the judiciary posed by terrorism prosecution *(United States v. Abu Ali* 2008). The defendant in *Abu Ali*

was an American citizen who traveled to Saudi Arabia to study at the Islamic University in Medina. He was arrested by Saudi Arabian authorities in 2003 because he was believed to be involved with a terrorist group responsible for killing thirty-nine people in Riyadh, Saudi Arabia including nine Americans. Officials of the United States government feared he may have been planning attacks inside the United States and began an investigation. The suspect was eventually transferred to custody of the United States and charged with Material Support to a Terrorist Organization and several other related charges.

The case of *Abu Ali* brought up several legal issues for the American judicial system. The suspect was questioned while he was in Saudi Arabian custody by members of the Saudi Arabian government. On at least one occasion, agents from the Federal Bureau of Investigations (FBI) were present while the defendant was questioned although their participation in the questioning was limited (Vladeck 2010, 1507).[1] The suspect alleged that he was tortured while in the custody of the Saudi Arabian government and that his statements were not voluntary. In *Abu Ali* statements made by the defendant to officials from the Saudi Arabian government were the basis for the criminal case against him in the United States. The facts in *Abu Ali* presented unique challenges for the judiciary concerning the admissibility of the defendant's statements.

In response to these issues, the court had to determine whether the defendant's statements in *Abu Ali* were voluntary and if *Miranda* warnings were necessary during the questioning while the FBI agents observed the interrogation. The Saudi Arabian

[1]FBI agents were allowed to suggest questions to be asked by the Saudi Authorities, but only six of thirteen questions requested by the FBI were put to the suspect.

government would not allow its officials to travel to the United States for trial. The officials were deposed in Saudi Arabia and the defendant was not permitted to be present for the deposition, although he was able to see the deposition through a video link raising Sixth Amendment Confrontation Clause issues. Additionally, classified information used in the case presented a challenge because only persons with a security clearance were permitted to see the original information while others without a security clearance could only see redacted portions of the classified documents.

The suspect in *Abu Ali* was convicted at his trial and the conviction was upheld on appeal to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit opinion ruling in favor of the government has been cited 194 times as of this writing.[2] The reasoning of the Fourth Circuit laid out in *Abu Ali* created a framework that can be used as precedents in further cases. The majority of the cases that cite *Abu Ali* as precedent do not relate to terrorism; they are criminal justice cases involving domestic criminal offenses and civil cases.

As *Abu Ali* illustrates, once a precedent is created, it may be used as legal authority in cases that have few similarities or that do not involve the same legal challenges. There is an often quoted saying that "bad cases make bad law." In this instance the case is not a bad case, but rather represents the changing nature of cases and controversies in the judicial system. As new and important cases are generated from terrorism cases, the precedents created by the cases will shape subsequent rulings in the court system. The law is what the judges say it is and when a precedent is created from a

[2]This includes string citations where no analysis was present. The case has 20 citations in the data set for this paper where it was treated positively or negatively.

terrorism case it becomes new law that may be applied to cases that are not related to terrorism.

The impact of terrorism trials will become more pronounced as more cases enter the judicial system. In response to the September 11th terrorist attack, the United States implemented several changes aimed at preventing another terrorist attack and increasing the security of the country. The Department of Homeland Security was created to coordinate activities to prevent terrorism. Additionally, the PATRIOT Act was passed which expanded the powers of the government to assist in preventing acts of terrorism.[3] Many changes were aimed at facilitating the collaboration between intelligence agents and law enforcement agents. FBI Director Robert Mueller summarized the changes in the FBI in a speech in 2003:

> The September 11th attacks against New York and Washington changed the course of history. They changed the meaning of national security for the United States and dramatically shifted FBI priorities so that the prevention of terrorist attacks became the FBI's top priority and overriding focus (2005, 329).

Additionally, on November 13, 2009, United States Attorney General Eric Holder announced that five suspects held at Guantanamo Bay would be charged in civilian court including Khalid Shaikh Muhammad who was thought to be one of the chief planners of the September 11, 2001 terrorist attack (Savage 2009). Ahmed Ghailani was tried and convicted in 2012 in a civilian criminal court for the embassy bombings in Kenya and Tanzania. He was the first detainee from Guantanamo Bay to be tried in the United States criminal justice system (Goldsmith 2010). Even if military courts are used for some terrorism cases, the announcement from Eric Holder, the increased resources

[3] The full name of the PATRIOT Act is the Uniting and Strengthening America by Providing Tools Required to Intercept and Obstruct Terrorism Act.

devoted to protection from terrorism, and the trial of Ghailani indicate that many terrorism cases are likely to be tried in civilian court.

While the influx of terrorism cases is a recent shift, it is not the first time the criminal justice system has experienced a policy driven wave of prosecutions. Lawrence Rosenthall points out that the introduction of crack cocaine caused a huge spike in violent crime which necessitated a response from the police and thus an influx of unique cases into the court system (Rosenthal 2004, 647). Joel Samaha believes that "nothing in recent history has tested the balance between community security and individual autonomy, and between ends and means, more than two 'wars': first on drugs and now on terror" (Samaha 2011, 9). While the rise of terrorism cases into the criminal justice system might be a recent change, the rise of drug cases began in the 1980s. As Samaha and Rosenthall point out, both types of cases involve principles of security and liberty in cases that have frequently been associated with violence.

An example of how a criminal justice precedent might impact other areas of law can be seen in *Florida* v. *J.L* (2000). In this case the police received an anonymous tip that a person was carrying a gun at a bus stop. The search of the person was deemed to be a violation of the Fourth Amendment and the gun was not allowed to be used in court. In the decision, Justice Ginsburg wrote:

> The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. (*Florida v. J.L.* 2000, 273-274).

Justice Ginsburg, not a conservative member of the Court, admits that the outcome of the case may have been different based on the seriousness of the case. Her written opinion

shows that a judge's legal opinion can be influenced by a fact pattern that includes a serious risk to the public and the need to apprehend a dangerous, violent criminal. When the precedent based on that high risk is created, it can then be applied to the reliability of information needed to stop a less violent criminal.

In an op-ed piece in the *Wall Street Journal*, Former Attorney General Mike Mukasey suggested precedents from terrorism cases were likely to change case law related to criminal procedure (Mukasey 2007). He warned that even when terrorism cases lead to conviction they may cause relaxed standards for conviction, arrest, and search and seizure. These relaxed standards may be used in other cases. Others have suggested that the daily reports of terrorism on the news is desensitizing Americans to violence (Kamin 2007). Compared to techniques used in the Abu Ghraib prison in Iraq that became front page news, lengthy interrogations by the police in domestic criminal investigations will seem mild (Kamin 2007).

Judges are not isolated from other areas of the public and are subject to the same security concerns as other members of society. When there are strong concerns about security, the public is often willing to sacrifice liberty. Opinion polls indicate that after a crisis such as the attacks of September 11, 2001, the public is willing to sacrifice civil liberties for security (Lewis 2005; Power 2006). In the frequently administered survey question where respondents are asked what is the most important problem facing the country today, prior to 2001 respondents who listed terrorism as the most important problem never rose above a half of a percent (Lewis 2005).[4] In October of 2001, the problem of terrorism was cited as the most important problem by 46 percent of the

[4] The study examined the responses to the most important problem question between January 1991 and September 2001 finding terrorism never appeared to be an important issue.

respondents. In two separate polls asked in 2002, when asked whether they were more concerned about the FBI violating their civil liberties or not doing enough to gather information on terrorists, respondents overwhelming responded that they were more worried the FBI was not doing enough to gather information. A public opinion poll taken in October 2001 showed that 65 percent of respondents wanted Congress to pass whatever law officials said they needed to protect the country even at the expense of civil liberties (Lewis 2005). These polls show that during times of security concern, many people are willing to sacrifice liberty to security. These same concerns can affect judges and the decisions they create (Epstein et al. 2005).

One legal scholar, Charles Weisselberg, discusses the possibility of terrorism prosecutions affecting other areas of law. He compares the "war on terror" to the "war on drugs" in the 1980s. He lists several influences from the war on drugs in shaping constitutional rules related to criminal procedures:

> …the "good faith exception" to the Fourth Amendment's exclusionary rule; the use of an anonymous tip to secure a search warrant; application of the Fourth Amendment to searches in other countries; searches of students in public schools; searches of automobiles; pretext stops by police; searches of parolees; and the ability of a "business" visitor to a home to contest a search of the premises (Weisselberg 2008, 37).

According to this analogy, law enforcement and government resources are being devoted in an effort to combat what is seen as a growing and dangerous trend. Just as the war on drugs provided new fact patterns for precedents and thereby assisted in changing the development of criminal procedures, the war on terrorism will provide similar opportunities.

As the examples above illustrate, the law is not static, but rather it changes over time. The advent of the war on drugs in the 1980s created a number of decisions that

were used in other areas of law. One would expect, then, that the war on terror will have similar effects. It will be important to understand where the precedents from these cases are likely to be used, which courts are likely to use the citations, and what impact they will have on the development of criminal procedure. Some precedents will have greater impact than others and understanding what factors influence that impact will provide a better understanding of how the law develops. Understanding how a judge reaches a decision is important, but many of the decisions created by judges will continue to have an impact long after the judge who created the decision has retired. If judges are subject to the same security concerns as other parts of society, understanding the impact of these security concerns on the precedents created by their decisions will be important.

Using the example of the Fourth Circuit opinion in *United States v. Abu Ali* may shed some light on the impact of terrorism cases on more routine criminal justice cases. *Abu Ali* was cited three times as a precedent for cases concerning the admission of a defendant's statement. In two of the instances it was cited by courts outside of its circuit in reference to the questioning of a suspect outside the United States and the applicability of *Miranda* to those statements. The third instance involved a routine robbery case where the questioning of the suspect took place inside the United States and the case was used as precedent by a lower court from within the same federal judicial circuit. This type of precedent from a higher court in the same circuit is considered binding and lower courts are supposed to follow the decisions of higher courts in their circuit. While there are many influences on the decisions of judges, research has shown that precedents from higher courts influences the decisions of judges (Cross et al. 2010; Hettinger, Lindquist, and Martinek 2007; Segal 2011). Precedents can also influence the decision of a judge

by acting as a constraint on the decision of justices while the traditional view of legal reasoning is that judges use their analytical reasoning skills to determine the appropriate decision based on legal rules (Brisbin 1996; Friedman 2006; Kritzer and Richards 2005). Understanding where precedents are used and providing a better understanding of their influence will assist in understanding the development of the law and the impact of precedents on the judicial system.

Judges are Influenced by Security Concerns

Some scholars believe the courts will treat cases with national security concerns differently than past criminal procedure cases (Samaha 2011; Stevenson 2011; Stuntz 2001; Sunstein 2008b; Weisselberg 2008). Sarah Chandler believes the court will apply different Fourth Amendment standards to issues of national security (2006). She supports her argument using a footnote from *Katz v. United States* which states that the Court may apply the Fourth Amendment to electronic searches differently if the case involves national security (Chandler 2006). She cites other cases, such as *National Treasury Employees Union v. Von Raab*, noting that the Court has a history of using different standards due to the needs of the government and balancing those needs with the rights of individuals in determining the legality of a search. One potential issue for appellate litigation involves "sneak and peak" search warrants that allow the government to conduct a search without seizing anything and without notifying the owner of the search for up to thirty days after it has been conducted (Chandler 2006, 224). Federal legislation could also cause the courts to treat national security cases differently under the Fourth Amendment. The need for information and the passage of statutes such as the

PATRIOT Act have expanded the authority of the government to conduct searches and caused the courts to "defer to explicit intentions of the legislature" and "impact the reasonable expectation of privacy analysis" (Stevenson 2011, 158). It is likely that Fourth Amendment cases dealing with national security will be treated differently from other criminal procedure cases.

The comments of Supreme Court justices indicate that the judiciary will view terrorist cases differently from other types of cases. During a visit to New York City former Justice Sandra Day O'Connor commented that terrorism "will cause us to re-examine some of our laws pertaining to criminal surveillance, wiretapping, immigration and so on" (Greenhouse 2001, B5). Justice Scalia also made a speech in which he said that individual liberties can be scaled back during times of crisis, but only to certain minimums ("Scalia addresses wartime constitutional rights, wkyc.com" 2003). In a speech before the Association of the Bar of New York City, Justice Breyer noted that there is a balance between the actions of the government and the liberties of the citizens, but that in wartime "more severe restrictions may be required" (Breyer 2003). The comments of these Supreme Court justices indicate the judiciary will treat cases that include a concern for security such as terrorism cases differently than other types of criminal procedure cases.

There is a great deal written concerning the acquiescence of the judiciary to other branches of government on important security issues or whether the courts act as a protector of rights. Several scholars are concerned about the possibility of decreased protection of civil liberties due to the increased concern about terrorism (Ackerman 2006; Cole 2002; Lobel 2001). Epstein et al., have a lengthy discussion of whether the

government protects rights during times of crisis or allows other branches of the government to respond to the emergency without questioning the legality of their actions (2005). The reason for deferring to other branches of government is due to the seriousness of the offenses. Dissenting in *Boumediene v. Bush*, Justice Scalia stated that allowing terrorists detained at Guantanamo Bay *habeas corpus* rights similar to common criminals would "almost certainly cause more Americans to be killed" (2008, 2294). The threat and possible consequences of terrorist actions can influence the decisions of judges.

Scholars have looked at the response of the judiciary to increased threats and found that, while the response may be slow, the judiciary tends to expand rights when threats to security are low and restrict rights when threats to security are high. Richard Posner finds that "constitutional rights change as the relative weights of liberty and safety change" (R. Posner 2006a, 40). Williams Stuntz argues that "Whether or not it should, the law of criminal procedure plainly does change in response to changes – both qualitative and quantitative – in crime." (Stuntz 2001, 2150). Eric Posner and Adrian Vermeule believe that the executive branch is in a better position to respond to emergencies and advocate that practices such as coercive interrogations should be legalized (2007, 184). These scholars suggest that the government will respond to changing security threats by decreasing the liberty of citizens, and that it is appropriate for the judiciary to defer to the other branches of government on security issues.

Increases in the crime rate and the changing nature of the threat can impact how the judiciary views the balance between liberty and security. Judge Richard Posner explains this influence:

> The low crime rate in the 1950s set the stage for the Supreme Court in the 1960s to multiply the rights of criminal defendants; then crime rates rose rapidly (whether or not because of that multiplication) and there was a backlash and the Court curtailed defendants' rights both directly, by redefining constitutional rights, and indirectly, by upholding congressional limitations on those rights. The safer the nation feels, the greater the weight that the courts place on personal liberty relative to public safety (R. Posner 2006a, 40).

Others suggest similar changes in criminal procedure that came about as a result of concern over increased crime. As noted by one scholar:

> Crime fell in the 1940s and 1950s; Fourth Amendment rights expanded in the 1960s. Crime rose sharply in the 1960s; Fourth Amendment protection receded in the 1970s and 1980s. Crime fell again in the 1990s, and by the end of that decade Fourth Amendment rights were once again expanding (Stuntz 2001, 2155).

While both Posner and Stuntz believe it takes time for the judiciary to respond to changes in security threats, they both see the courts as reactive to changes in crime rates and security threats to society.

As precedents from these cases are created, they can influence other criminal justice cases. If, as Posner and Stuntz argue, there is deference to the government, this shift can influence the law in a specific direction. The rights of citizens do not vary based upon the seriousness of the crime. If the "courts approve police tactics designed to fight terrorists, they will also be sanctioning the use of the same tactics against other sorts of criminals" (Stuntz 2001, 2140). There are examples of security concerns influencing judicial policy prior the attacks of September 11, 2001, William Stuntz noted:

> We have seen this before. One cannot read Fourth Amendment cases form the 1980s without sensing judicial attention to the pros and cons of the war on drugs – even when the cases did not involve drug crimes. Crack dealers were the most salient crime problem a dozen years ago; now, terrorists occupy that place. (Stuntz 2001, 2140–2141).

It is possible that precedents from terrorism cases will affect the development of the law similar to the war on drugs from the 1980s.

Charles Weisselberg made exactly this claim that precedents from terrorism cases would influence the criminal procedure similar to the war on drugs (2008). He points out that the drug cases influenced the development of law in many areas such as the use of the anonymous tip, searches of automobiles, searches of students, pretextual stops, searches of parolees, and others. In addition to case law development, legal changes were also influenced by legislative action such as changes in the conspiracy law which provided proof exceptions for drug conspiracies and the sentencing guild lines which punished crack cocaine more severely than powdered cocaine (2008, 37-38). As more terrorism cases are litigated and precedents are produced by those cases, Weisselberg believes these precedents will impact criminal procedure similar to the impact of drug cases.

Recent statements by public officials lend support to this view as well. Attorney General Eric Holder has advocated for changes in the application of the public safety exception to *Miranda* in order to provide the government with greater authority when questioning terror suspects (Baker 2010; Williams 2010). Holder believes this is necessary because the government must determine if the suspect has information about eminent terrorist attacks. Former Attorney General Michael Mukasey claims that the judiciary has harmed anti-terrorism efforts because information disclosed in open court has been used by terrorists (Mukasey 2007). The impact of a terrorist event can be greater than simply the damage inflicted on a society. Richard Posner explains:

> The broader point is that prevention is a much more important policy goal in the case of global terrorism than in the case of ordinary crime. The nation can live with 30,000 ordinary murders a year, but not 30,000 murders by terrorists. Criminal punishments are designed to limit the crime rate, but not to reduce it to zero; the costs would be disproportionate to the benefits. This is much less clear in the case of terrorism. (R. Posner 2006b, 135).

The security concerns for terrorism cases will influence the judiciary more than ordinary crime. Officials from both Democratic and Republican administrations have called for terrorism crimes to be treated differently. Even when terrorism incidents have the same impact as ordinary crime, the effect of judicial decisions is likely to be greater.

An example of this influence on criminal procedure law is illuminating. In *United States v. Reyes* (2003) a suspect was questioned without being informed his *Miranda* rights as he was being arrested on a drug charge. The suspect made an incriminating statement and the government claimed that public safety exception allowed the statement to be used. The district court found that the arrest was routine and allowing an exception this case would mean that "every suspect in police custody can be interrogated, without *Miranda* warnings" (*United States v. Reyes* 2003, 282). In overturning the district court, the United States Court of Appeals for the Second Circuit relied on only one binding precedent, *United States v. Khalil* (2000). This precedent is from a terrorism case where the questioning of a suspect was allowed under the public safety exception to *Miranda*. The precedent in *Khalil* was premised on the need to immediately question a terrorism suspect to prevent a bomb from exploding. *Khalil* has been applied again in a similar manner after *Reyes* and now the Second Circuit decision in *Reyes* is now a precedent applied to other common criminal procedure cases. When precedents from terrorism cases are created, they affect more than just their specific case. The precedents are applied to subsequent cases and influence the development of criminal procedure law.

Former attorney general Michael Mukasey gives several examples of how terrorism cases are different from regular criminal cases (2007). In the case against Jose Padilla, he was designated an enemy combatant. Padilla was not tried in civilian court

because some evidence against him was not admissible in that court and because he was a valuable as a source of intelligence. He explained that the list of co-conspirators in the case against Omar Abdel-Rahman, the blind sheik, for the 1993 World Trade Center bombing was released to the defense as required by law. He says this list was used by terrorists as a form of intelligence to understand what information the government had and how it was obtained. In addition to problems of the admissibility of evidence and the release of intelligence is the use of the rights provided by the Constitution. Mukasey points out that Khalid Sheikh Mohammed, the mastermind of the September 11, 2001 attacks, told his American captors that he wanted a lawyer and would see them in court. Mukasey concludes:

> …if conventional legal rules are adapted to deal with a terrorist threat, whether by relaxed standards for conviction, searches, the admissibility of evidence or otherwise, those adaptions will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law (Mukasey 2007).

Precedents created by prosecutions from terrorism cases will influence the development of law in criminal procedure.

The law related to terrorism cases is in its infancy and only a small number of terrorism cases have been decided at the federal courts of appeals level. The security issues in terrorism cases will be greater than the last security threat of drug cases which influenced criminal procedure law. Cases related to the prosecution of terrorism cases are increasing due to the increase in the threat and perception of the threat of terrorism. These cases are going to create precedents that will be applied to both terrorism and non-terrorism cases. It is important to understand what impact these cases will have on the development of law and how they will be treated by the judiciary. If the precedents from

terrorism cases create standards that favor the government, those same rules can be applied to ordinary criminal justices cases and affect the general liberties of society. The following chapter will look specifically at precedents from terrorism cases dealing with *Miranda*, where they were used, and how they influenced the cases that cited them.

In order to evaluate the role of precedents from terrorism, this study will use both qualitative and quantitative methods. After discussing standards that have defined the law of confessions, Chapter 2 provides an overview of specific legal issues associated with Miranda that arise as civilian courts try suspects accused of terrorism, tracing the use of precedents in the lower courts. Doctrine emanating from precedents established by terrorism cases continues to develop, but several federal courts of appeals' decisions have reconciled standards from Miranda and existing case law as they apply to the investigation and prosecution of terrorists. Tracing where these circuit court precedents have been used and how they have been interpreted will help to understand how precedents from the prosecution of terrorism cases will likely impact judicial policy in other contexts where there is no perceived threat to national security. Chapter 3 discusses previous research on the impact of precedents on judicial policy, the influence of security issues on the judiciary, and what previous studies indicate will be the impact of security issues on the judiciary. Chapter 4 describes the observation strategy for this analysis that begins with the identification of "parent" cases and follows the treatment of these "parent" precedents in subsequent "progeny" decisions. As a comparison, this study collected similar data on the judicial treatment of precedents established from drug prosecutions during the same time period. Chapter 5 provides a portrait of both "parents" and "progeny" that highlights where and how "parents" were treated by progeny. Chapter

6 presents multivariate statistical models to examine the impact of precedents for the prosecution of terrorism cases more broadly. Chapter 7 discusses the conclusion and impact for future research.

CHAPTER 2

INFLUENCE OF TERRORISM PRECEDENTS ON *MIRANDA*

"The threat of global terrorism…is novel. The case law addressing constitutional rights affected by measures to meet the terrorist threat is in its infancy."

- Judge Richard Posner (2006, 28)

Prior to the terrorist attacks of September 11, 2001, Zacarias Moussaoui raised suspicion by taking flight lessons for training on a Boeing 747 without any previous experience flying an airplane (Allen 2008). The Federal Bureau of Investigations (FBI) began an intelligence investigation that led to his August 16, 2001, detention on immigration violations. According to FBI attorney Coleen Rowley, FBI agents involved in the investigation wanted to conduct a search of Moussaoui's laptop and belongings prior to September 11, 2001, but were blocked by supervisory agents who did not believe probable cause existed for the search. After the attacks, searches were conducted although no new evidence concerning Moussaoui was obtained and the searches were based on the same information that supervisory agents previously rejected. Terrorist events that occurred hundreds of miles away caused a change in the perception of probable cause.

Recent high profile terrorist events also illustrate how terrorist events can influence the development of law and perceptions of legal doctrine. These incidents deal specifically with changes in the admission of statements. Umar Farouk Abdulmutallab was arrested for the attempted bombing of an airplane bound for Detroit on Christmas

Day in 2009. Faisal Shahzad was arrested and charged with the attempting to explode a car bomb in Times Square in New York City in 2010. During the initial questioning of both suspects, investigators did not advise either person of their rights under *Miranda* (Savage 2010a). Abdulmutallab was questioned for about fifty minutes before being read his *Miranda* rights while Shahzad was questioned approximately two to three hours before he was advised of his rights under *Miranda*. In both cases, the government was relying on the public safety exception to *Miranda* as the reason for the delay. Publicly, Attorney General Eric Holder had been advocating for the extension of the public safety exception to *Miranda* for situations such as these (Baker 2010). According to Holder in instances of suspected terrorist attacks, the first obligation of the government is to protect its citizens from further harm rather than gathering evidence for use in a criminal prosecution.

It is not known what information was obtained from these initial interviews of Abdulmutallab and Shahzad prior to the use of *Miranda* warning. It is likely that any statements made prior to *Miranda* will be challenged in court. If the statements are admitted as Eric Holder and others believe is appropriate, this may help to expand the public safety exception to *Miranda*. Even if during the original questioning there is no intention of using the statements in court, evidence may be obtained that is crucial to the prosecution of the case. Any precedents created from these cases are not limited to be cited by other terrorism cases or cases involving serious crimes. The precedents are likely to be used in common criminal justice issues and thus influence the development of the law related to the public safety exception to *Miranda*.

This chapter will discuss and provide examples of the use of precedent in terrorism cases and how those precedents affect the development of the law. The primary focus of the chapter will be precedents related to *Miranda* and some of the unique challenges that occur when *Miranda* is applied to terrorism cases. Two other examples will also be provided in other areas of criminal procedure to show how precedents from terrorism cases could impact other areas as well. The first part of the chapter will discuss how *Miranda* is applied in criminal justice cases and will discuss the development of law related to confessions in criminal cases.

Development of Law Related to *Miranda*

The investigation of criminal cases frequently involves the questioning of suspects. Statements made by suspects are often important evidence used to support the government's case. Statements can be used if the suspect confessed to a crime or even to show that the suspect's version of events could not have occurred. Investigators in a criminal case will attempt to question the suspect or suspects to assist in determining the truth about what occurred. Terrorism cases are no different from other criminal cases in this regard. Statements from suspects are important to the criminal prosecution. The unique challenge of terrorism cases is when the questioning of suspects occurs outside the United States either by agents of the United States government or by officials from a foreign government.

The admission of statements into evidence is guided by the decision in *Miranda v Arizona* (1966) which is a case familiar to many Americans. *Miranda* created a requirement for suspects to be notified of certain rights prior to being questioned. The

Miranda warnings require the police to inform a suspect of his or her right to remain silent, that any statements made can be used against the suspect, that the suspect has the right to an attorney and that an attorney will be appointed if the suspect cannot afford one. While these rights might be familiar to most Americans, they are not common practice for officials in other countries. The admission of statements made to officials of a foreign government when the suspect was not informed of his or her *Miranda* rights presents one issue. A related problem occurs when an official from the United States questions a suspect in custody in another country. The *Miranda* warnings state that a suspect has the right to an attorney and that one will be appointed if the suspect cannot afford one. If a suspect is in the custody of a foreign government, the laws concerning access to an attorney are controlled by the foreign government, not by the United States. The admission of statements made to officials of the United States government while a suspect is in custody in the custody of a foreign government present another *Miranda* issue since the requirements of *Miranda* cannot be met.

Legal History of Confessions

The laws concerning admission of statements in criminal trials in the United States are controlled by several amendments to the Constitution of the United States. The Fifth and Fourteenth Amendments have due process clauses guaranteeing that federal and state governments will treat defendants fairly in providing a legal process for trials. The Fifth Amendment also provides that no person can be "compelled in any criminal case to be a witness against himself" (U.S. Constitution, amend. 5). The Sixth Amendment guarantees that "In all criminal proceedings, the accused shall…have the Assistance of

Counsel for his defense" (U.S. Constitution, amend 6.). These amendments have spawned a great deal of litigation defining the rights of the accused in United States criminal justice system as they relate to the Constitutionality of confessions made to law enforcement officials.

Prior to *Miranda*, the primary concern for the admission of statements and confessions was that they were voluntary and reliable. One of the earliest cases on confessions is *Bram v. United States* (1897) where the confession made to a police officer by an accused murderer was ruled to be a violation of the Fifth Amendment. In examining the questioning of the suspect by the police officer in this case, the Supreme Court determined that answers given by the suspect were not provided voluntarily. From this the Court decided that statements which are involuntarily made are not permissible in court. Involuntary statements were determined to violate the clause of the Fifth Amendment providing that "no person shall be compelled in any case to be a witness against himself." In *Brown v. Mississippi* (1936), the Supreme Court applied the Fourteenth Amendment due process clause to the admission of statements. *Brown* involved the beating of a murder suspect by a sheriff's deputy. The deputy accompanied by members of the community tortured a suspect by hanging and releasing him. The suspect did not confess, so he was beaten the following day with the instruction that the beatings would continue until he confessed. Two other defendants were beaten and given the same instructions that the beatings would continue until they confessed in the manner and with the detail requested by the deputy. All three confessed. The state court in this case ruled that the confessions could be admitted and were reliable, but the Supreme Court determined that the nature of the confessions violated the due process rights of the

Fourteenth Amendment and that these rights applied to defendants in state courts. Further cases such as *Chambers v. Florida* (1940) and *Ward v. Texas* (1942) relying on due process arguments also invalidated confessions where physical coercion was involved.

Incorporation

The process of applying rights from the first eight amendments of the Constitution and making them applicable to the states is known as incorporation. *Powell*, *Chambers*, and *Ward* are all cases where the Supreme Court applied rights found in the Bill of Rights to the states because that right is incorporated by the Fourteenth Amendment Due Process Clause. The Court in these cases determined that some rights are so fundamental to our system of law that to deny those rights would be to deny the defendant the due process of law guaranteed by the Fourteenth Amendment.

Justices of the Supreme Court disagreed about how the provisions of the first eight amendments applied to the states. Some justices such as Felix Frankfurter advocated an idea of fundamental fairness stating that

> The Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole court of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon idiosyncrasies of a merely personal judgment (*Adamson v. California* 1947, 67-68).

Frankfurter rejected the idea that the Due Process Clause of the Fourteenth Amendment incorporated all of the rights contained in the first eight amendments but rather promoted

the idea that only certain fundamental rights were included in the Due Process Clause: "It would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way…" (*Adamson v. California* 1947, 63). Justice Hugo Black advocated for the incorporation of all of the Bill of Rights to the states rather than having the Court decide which rights were important enough to apply to the states:

> I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights…I would follow what I believe was the original purpose of the Fourteenth Amendment – to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution. (*Adamson v California* 1947, 89).

Black believed that the Bill of Rights listed the basic rights fundamental to our system and substituting those rights for any others would be re-writing the Constitution. In recent years the Court has adopted a process of selective incorporation where "the Due Process Clause fully incorporates particular rights contained in the first eight Amendments" (*McDonald v. Chicago* 2010, 3033). "The Court abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,' stating that it would be 'incongruous' to apply different standards 'depending on whether a claim was asserted in a state or federal court'" (*McDonald v. Chicago* 2010, 3035). This process of selective incorporation has applied most of the Bill of Rights to the states including the privilege against self-incrimination in *Malloy v. Hogan* (1964).

Modern Case Law on Confessions

The above cases make clear that physical coercion will be found by the courts to violate the Constitutional rights of suspects and bring into question the voluntariness of any statement obtained as the result of physical coercion. In *Ashcraft v. Tennessee* (1944), the Court dealt with questions of coercion not involving physical force. The defendant, Ashcraft, was questioned in relation to the murder of his wife. The questioning occurred over a thirty-six hour period with the investigators working in shifts to allow themselves to stay alert. After twenty-eight hours of questioning, Ashcraft implicated a co-defendant, Ware, who was also brought in for questioning. Ware made a statement that he had been hired by Ashcraft to commit murder after which Ashcraft is said to have admitted the truth, although he refused to sign a statement. The Court ruled that it was "inconceivable" that holding a person without sleep for thirty-six hours could be considered a voluntary confession. The Court began a balancing test in determining if statements were voluntary weighing "the circumstances of pressure against the power of resistance of the person confessing" (*Stein v. New York* 1953, 185). The emphasis in *Ashcraft* was on the misconduct of the police and the tactics employed by them. The decision emphasized that a coerced confession violates the due process clause and is contrary to the "basic law of our Republic" (*Ashcraft v. Tennessee* 1944, 155).

In *Culombe v. Connecticut* (1961), the Supreme Court again looked at the voluntariness of a confession. Unlike *Ashcraft*, there was no interrogation that lasted longer than three to four hours, although *Culombe* was held in custody for over four days. The Court in *Culombe* looked at several previous cases and the overall facts in *Culombe* to determine the voluntariness of the statements. In addition to the length of time that

Culombe was in custody, other factors that influenced the Court's decision were the police use of Culombe's daughter and wife to solicit a confession, Culombe's fear of his co-defendant, and Culombe's request for an attorney. Ultimately, the Court determined the test for voluntariness was whether considering the totality of the circumstances "the confession the product of an essentially free and unconstrained choice" (*Culombe v. Connecticut* 1961, 602). If the confession was the product of a free and unconstrained choice, than it could be used in court. If not, the confession was determined to violate the due process clause as the will of the defendant was overborne.

The rights of suspects under the due process clause were further explained in *Haynes v. Washington* (1963). Raymond Haynes was questioned for sixteen hours prior to confessing to a robbery. In looking at the totality of the circumstances, the Court determined that his confession was not voluntary and violated the due process clause of the Fourteenth Amendment. When questioned by the police, Haynes requested to call an attorney and to call his wife. The police responded by telling him that he would not be allowed to communicate with anyone until he confessed. The Court determined that holding a suspect incommunicado unless he confesses amounts to coercion and prevents a statement from being made voluntarily. The standard used by the Court to determine if the confession was voluntary continued to be if under the totality of the circumstances the suspect's will was overborne and if the choice to confess was made freely. While many of the decisions on the admissibility of confessions in recent cases concern the applicability of *Miranda*, there are still issues surrounding voluntariness. Even when a suspect agrees to speak with the police, questions surrounding the voluntariness of statements can occur. In *Mincey v. Arizona* (1978) the police questioned a seriously

injured person in the intensive care unit. The suspect said that he did not want to be questioned and wrote that he wanted an attorney before making further statements. The Court ruled that the suspect's will was overborne and that the confession was not voluntary. In *Colorado v. Connelly* (1986), a suspect traveled to Colorado and approached a police officer to confess to a murder. He did this because he was compelled by voices in his head either to commit suicide or to confess. The Court noted that the police did not use any coercive methods to obtain the confession and, despite any psychological coercion of his own, the confession was allowed in court. In *Arizona v. Fulminate* (1991), a suspect in prison on a weapons charge confessed to his cellmate, a police informant who was intentionally placed in the same cell as the defendant. The suspect had been receiving threats because of his alleged involvement in the killing of an eleven year old girl. The informant claimed to be a member of organized crime and offered the suspect protection in exchange for his confessions. The Court said the confession was based on a credible threat of physical violence and was not voluntary.

In the three cases above, the difference in the suppression of a confession and the admission of the confession is the behavior of the police. In *Mincey* and *Fulminate*, the conduct of the government was coercive while in *Connelly*, the police were not part of the coercion. Connelly felt compelled to confess to the murder, but the coercion came from voices in his head rather than from any action of the government. In *Mincey* and *Fulminate*, the government conduct produced a confession based on either coercion or the threat of physical violence. Even after the decision in *Miranda*, due process concerns can still impact the admission of a confession.

After relying on the actions of the government and the conditions of questioning to determine the voluntariness of a confession, the Court began to turn to other safeguards to ensure that statements made to the police were voluntary. Terms concerning "coercion," "voluntariness", and "overbearing the will" were replaced by specific procedural safeguards (Israel et al. 2011, 353). The four justice dissent in *Cooker v. California* (1958) rejected the idea that a confession could be voluntary if a defendant was denied access to the advice of an attorney when requested by the defendant. In looking at the reasons for excluding statements from trial, the Court determined that the voluntariness of a statement was secondary to determining if the statements that were made violated the Constitution. In addition to due process issues, Sixth Amendment protections about the right to counsel also create constitutional issues for the admission of statements and confessions into court.

In *Powell v. Alabama* (1932), the Court determined that a right to counsel existed and that the Fourteenth Amendment due process clause guaranteed this right mentioned in the Bill of Rights. The Court determined that the assistance of counsel was fundamental in capital cases if the defendant was not capable of either employing counsel or otherwise providing for his own defense. In *Powell*, the defendants were assigned counsel on the morning of the trial which the Court deemed to be inadequate to provide effective defense. Six years after *Powell*, the Court established that the government must provide an attorney to all defendants in felony cases in federal court (*Johnson v. Zerbst*, 1938). The Court pointed out that few defendants have the professional legal skill to adequately defend themselves. The Court went further to point out that prosecuting a

defendant without an attorney amounted to taking life or liberty without due process of law and that it violated the guarantees of the Sixth and Fourteenth Amendments.

While *Johson v. Zerbst* provided federal defendants the right to an attorney, this was still a question in state courts. *Betts v. Brady* (1942) failed to provide all state defendants with an attorney; instead it provided an attorney to defendants in state courts only under special circumstances. A defendant had to show that an attorney was needed and that his or her case would be prejudiced without an attorney demonstrating that the court proceedings without a defense attorney would be fundamentally unfair. This could be shown either through a lack of education on the part of the defendant or by showing that the case was overly complex. *Betts* provided the assistance of an attorney to more defendants, but came short of providing an attorney to all defendants in state court proceedings.

The Court extended the right to counsel to defendants in state court proceedings in *Gideon v. Wainwright* (1963). The Court reasoned that if a provision of the Bill of Rights is fundamental and essential to a fair trial then the Fourteenth Amendment required that it apply to the states as well as the federal courts. Justice Black writing for the Court said, "…in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him" (*Gideon V. Wainwright* 1963, 344). Justice Black went on to say that the state spends a great deal of money on attorneys to prosecute criminal offenses and that defendants with money hire the best lawyers available in order to provide the best defense. It was obvious to Justice Black that the presence of an attorney had a significant impact on the outcome of a case. The opinion in *Gideon* said providing a fair trial is a

fundamental right of the legal system and unless a poor man charged with a crime has access to an attorney, he cannot get a fair trial.

In 1966, Earl Warren wrote the majority decision in *Miranda v. Arizona* creating what are commonly known as the *Miranda* warnings given to suspects when they are questioned. The Court in *Miranda* was concerned with the inherent coercive nature of questioning that occurs away from the public and behind the walls of a police station. In *Miranda*, the Court determined that the very nature of custodial interrogations is coercive. To remedy the coercive nature of police interrogations, the Court created rules that if violated would cause statements to be suppressed and not used in a United States court of law. The *Miranda* warnings require the police to inform a suspect of his or her right to remain silent, that any statements made can be used against the suspect, that the suspect has the right to an attorney and that an attorney will be appointed if the suspect cannot afford one. A violation of any of the warnings required by *Miranda* can cause a confession to be inadmissible regardless of the voluntariness of the statement.

While many of the previous cases discussed the due process clause of the Fourteenth Amendment and the right to counsel in the Sixth Amendment, in the *Miranda* decision, Earl Warren concentrated on the Fifth Amendment prohibition against self-incrimination. Warren stated the goal of questioning by the police was to "subjugate the individual to the will of his examiner" finding that "incommunicado interrogation is at odds with one of our Nation's most cherished principles – that the individual may not be compelled to incriminate himself" (*Miranda v. Arizona* 1966, 457-458). In determining how to apply the protections of the Fifth Amendment right against self-incrimination, Warren thought the court was merely speculating when it used standards involving an

assessment of the knowledge a defendant possessed to determine if a statement was voluntary under the totality of the circumstances. He favored providing concrete warnings which he described as a clearcut fact whether they had been given or not. The decision created a test for the admissibility of statements. An in-custody statement where the warnings were not given and the defendant did not waive his rights would violate the Constitution and render the statement inadmissible.

After the decision in *Miranda*, Congress passed the Crime Control Act of 1968 in an effort to overrule the decision in *Miranda*. The law declared that the basis of admitting statements into evidence is a determination of whether they were made voluntarily. Statements that were determined to be voluntary could be admitted into court. In 1999, the Fourth Circuit Court of Appeals ruled that the voluntary standard created in the Crime Control Act of 1968 controlled the admissibility of evidence rather than the *Miranda* decision (*United States v. Dickerson* 1999). The reasoning behind the Fourth Circuit decision was that the rules created in *Miranda* were not required by the Constitution so Congress had the authority to create the rules of evidence and procedure that controlled the admission of statements. The Supreme Court responded in 2000 stating that confessions are based on the Fifth Amendment right against self-incrimination and the Fourteenth Amendment Due Process Clause. Since *Miranda* is a decision based on the Constitution it cannot be overruled by an act of Congress. The importance of *United States v. Dickerson* is that it affirmed that *Miranda* rights are required by the Constitution and are not simply a measures used to protect or reinforce rights in the constitution.

While *Miranda* created a more concrete test for the admissibility of statements rather than the totality of the circumstances, the due process voluntariness test continued to find its way into current doctrine. As *Connelly*, *Fulminate*, and *Mincey* make clear, there are still circumstances when a question of voluntariness occurs. In addition, *Miranda* left other questions unanswered such as what constitutes custody, when does questioning occur, who can invoke *Miranda* rights, and what constitutes a waiver of rights. While *Miranda* provided a more concrete framework from which to analyze the admission of statements, it left many open questions.

In *Miranda*, the Court held that custodial interrogations where inherently coercive. Earl Warren was concerned both with the secrecy that occurs in private as well as the "compulsion inherent in custodial surroundings" (*Miranda v. Arizona* 1966, 458). The safeguards in *Miranda* were created because the Court believed "custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals" (*Miranda v. Arizona* 1966, 455). In reaffirming *Miranda* in *Dickerson*, Rehnquist noted "custodial police interrogation, by its very nature, isolates and pressures the individual" (435).

Individual determinations of custody are subjective and take into account the specific situation. The Court has determined that the issue of custody should be examined from the perspective of a reasonable person and if that reasonable person would feel free to leave. In *Berkemer v. McCarty* the Court decided "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation" (1984, 442). The Court reaffirmed this in *Stansbury v. California* stating, "the initial determination of custody depends on the objective circumstances of the

interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned" (1994, 323). Custody is a subjective term determined by how a reasonable person would view the circumstances.

One of the provisions of *Miranda* is for the government to notify the suspect of his right to an attorney. When questioning a suspect, the Court made it clear that if "he wishes to consult with an attorney before speaking there can be no questioning" (*Miranda v. Arizona* 1966, 445). The suspect can decide to speak with the police and waive his rights, but the waiver must be made "voluntarily, knowingly and intelligently" (*Miranda v. Arizona* 1966, 444). A suspect can waive his rights through actions such as speaking with the police, as was recently made clear in *Berghuis v. Thompkins* (2010) where a suspect demonstrated his waiver of his right to remain silent by speaking with the police even though he declined to sign a *Miranda* rights waiver form.

Since creating the decision in *Miranda*, the Court created a few exceptions to the requirements to inform a suspect of his or her rights prior to custodial questioning. In 1984 the public safety exception to *Miranda* was created in *New York v. Quarles*. In *Quarles*, a female reported that she had been raped and that the suspect just entered a supermarket armed with a handgun. Two police officers pursued the suspect with one entering the supermarket while the other radioed for further assistance. When the first officer entered the supermarket he saw a person matching the description of the suspect and the suspect turned and ran toward the rear of the store. The officer chased, but lost sight of the suspect. A few moments later the officer spotted the suspect and apprehended him at gun point. Upon handcuffing and searching the suspect, the officer noticed the suspect was wearing a shoulder holster for a pistol, but did not have a gun.

The officer asked the suspect about the location of the gun and the suspect motioned that the gun was in the area of some empty cartons.

In creating this exception to *Miranda* the Court recognized that there are certain instances when an immediate need for information to protect the public outweighs constitutional concerns of Fifth Amendment protections. The court reasoned that it was more important to protect the public against possible volatile situations than to protect possible violations of the Fifth Amendment. In *Quarles*, the police needed answers to their questions not only to assist in building a prosecutable case against the suspect, but also in locating the gun that was hidden in a public area for the safety of anyone in the area.

Another important exception to the *Miranda* requirement involves the suppression of evidence obtained from statements established in *United States v. Patane* (2004). When defendant Patane was arrested outside his home by an FBI agent, the agent began to advise Patane of his rights under *Miranda*. Patane stopped the agent and said that he was aware of his rights. The agent asked Patane about the location of a gun and Patane replied informing the agent that the gun was located in his house. The government conceded in this case that *Miranda* was violated, but that the Exclusionary Rule did not apply to violations of *Miranda*. The Supreme Court in this case agreed that even when violations of *Miranda* occur, they do not require the suppression of evidence obtained as a result of in custody non-*Miranda* statements.

As *Patane* and *Quarles* show, the Court has allowed the use of statements obtained in violation of *Miranda* in court proceedings. These are not the only exceptions as statements made in violation of *Miranda* can also be used to impeach a witness (see

Oregon v. Hass 1974). While the Court has affirmed the basic holdings of *Miranda* it has not so strictly held to the tenets of *Miranda* as to refuse to allow exceptions. *Quarles* represents a practical view of *Miranda* that the need for information to protect the public can outweigh the need to inform an individual of his rights under the Fifth, Sixth, and Fourteenth Amendments. *Patane* and *Hass* demonstrate that the Court can mitigate the impact of a *Miranda* violation.

Law on Questioning in Terrorism Cases

Many investigations of acts of terrorism involve both citizens of the United States and citizens of other countries. Investigations occur both inside and outside of the United States. Examining the impact of these investigations on *Miranda* can be divided into a few areas. In some situations, the questioning of suspected terrorists occurs inside the United States and in some instances the questioning occurs outside the United States. The questioning that occurs in other countries may be done by representatives of the United States government or by officials of foreign governments. Each situation presents challenges. If the questioning takes place inside the United States, the government officials may be more concerned with preventing further acts of terrorism rather than creating a prosecutable case. If the questioning occurs outside the United States, adhering to the *Miranda* warnings is extremely difficult. This chapter will examine those challenges and how they impact the development of law related to *Miranda*.

When a suspect is under the control of a foreign government, the United States has a limited ability to adhere to the requirements of *Miranda*. *Miranda* requires that a suspect be informed of his right to remain silent, that anything he says can be used

against him, to his right to an attorney, and to have an attorney provided to him if he cannot afford one. If a suspect is questioned by a member of a foreign government, that official will not inform the suspect of rights available to the suspect under *Miranda* as the official will likely be unfamiliar with them. The rights concerning statements, access to an attorney, and providing an attorney free of charge are likely to be different in the legal systems of other countries. Also, if a member of the United States government is questioning a suspect in a foreign country the ability to provide an attorney or even allow access to an attorney is likely to be non-existent.

Application of the Constitution

It is clear from the cases discussed above that the Constitution applies to citizens of the United States inside the border of the country, but does it apply to non-citizens? In *Mathews v. Diaz*, the Supreme Court declared that "The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law" (1976, 77). The decision in *Mathews* continued stating that "even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection" (1976, 77). The Court examined a similar issue in *United States v. Balsys* when a resident alien invoked his Fifth Amendment right against self-incrimination in a hearing. The Court determined that "Resident aliens such as Balsys are considered "persons" for purposes of the Fifth Amendment and are entitled to the same protections under the Clause as citizens" (*United States v. Balsys* 1998, 671). The Court has been willing to extend the protections against self-incrimination to non-citizens inside the United States.

Fifth Amendment rights also extend to non-citizens outside the United States. In *United States v. Verdugo-Urquidez,* the Court was concerned with Fourth Amendment rights, but states "Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" (1990, 269). While this may seem to preclude the protection of the United States Constitution to situation outside the United States, *Verdugo-Urquidez* based this analogy on *Johnson v. Eisentrager* which involved a war crimes trial of individuals captured in China and tried in Germany. In *Eisentrager*, the Court declined to extend Constitutional protections to enemy aliens captured at the end of World War II and tried in military courts outside the jurisdiction of the United States. These are circumstances very different from those surrounding the in custody questioning of a suspected terrorist who may be prosecuted in domestic criminal courts even if the questioning takes place outside the borders of the United States.

Despite the Supreme Court decision in *Verdugo-Urquidez,* circuit courts have concluded that the protections of *Miranda* apply to the questioning of suspects outside the United States by officials of the United States government. *Miranda* was created to prevent violations of the Fifth and Sixth Amendment. Earl Warren said in the *Miranda* decision that the warnings "combat the pressures" inherent in custodial interrogations (*Miranda v. Arizona*, 1966, 467). Excluding statements that violate the warnings provides an incentive for investigating officers to uphold the Constitution. There is a deterrent effect in place to prevent violations of *Miranda* because violations of the warnings render statements inadmissible in court. When United States officials question a suspect overseas, the *Miranda* warnings can still provide a deterrent effect to counter

the inherent coercive nature of custodial interrogations. This was acknowledged by the government in *United States v. Rommy* when the government did not "dispute the applicability of Fifth and Sixth Amendment protections to the custodial interrogation of a foreign national outside the United States by agents of this country engaged in criminal investigation" (2007, 131). Both the Fifth and Ninth Circuits have ruled that *Miranda* applies to in custody questioning when there is active participation of agents of the United States government (*United States v. Heller* 1980, *Pfeifer v. U.S. Bureau of Prisons* 1980). Despite the *Verdugo-Urquidez* statement that the Fifth Amendment does not apply to aliens outside the United States, it does apply when those statements are used in domestic criminal courts.

It is not uncommon for criminal acts to span jurisdictional boundaries with evidence of the crime found in more than one country. This includes instances when statements made to foreign officials are evidence of crimes prosecuted in domestic criminal courts. As mentioned previously, officials from foreign governments will not be familiar with the tenets of *Miranda* and may not comply with *Miranda* when questioning a suspect. While *Dickerson* made it clear that *Miranda* was a Constitutional requirement, the courts have not strictly interpreted the requirements of *Miranda* to exclude statements made to foreign officials without *Miranda* warnings. The Ninth Circuit succinctly summarized the law as it applies to statements made to foreign officials in *United States v. Chavarria* (1971):

> Miranda was intended as a deterrent to unlawful police interrogations. When the interrogation is by the authorities of a foreign jurisdiction, the exclusionary rule has little or no effect upon the conduct of foreign police. Therefore, so long as the trustworthiness of the confession satisfies legal standards, the fact that the defendant was not given Miranda warnings before questioning by foreign police will not, by itself, render his confession inadmissible.

The Second Circuit ruled similarly in *United States v. Welch* (1972) and *States v. Nagelberg* (1970). While these three decisions pre-dated the Supreme Court's decision in *Dickerson*, the federal courts have ruled similarly in post-*Dickerson* cases such as *United States v. Covington* (1985), *United States v. Bin Laden* (2001), and *United States v. Bagaric* (1983). The federal courts have consistently ruled that since there is no deterrent effect in suppressing statements made to foreign officials statements made outside of *Miranda* can be admitted for use in domestic criminal courts.

While statements made to foreign officials can be admitted in domestic criminal courts even when *Miranda* is not followed, there are further considerations. If agents of the United States government participated in the investigation to the extent that the investigation was a joint venture, the statements cannot be admitted. Statements made to officials of a foreign government can also be suppressed if the statements are not made voluntarily. Last, even if the statements were made voluntarily, they are inadmissible if the circumstances "shock the conscience." These are three important restrictions on the use of statements made to officials of a foreign country when they are presented for use in domestic criminal cases.

Joint Venture Doctrine

The protections of *Miranda* can apply to statements made to foreign officials if the investigation is determined to be a joint venture between the foreign country and the United States. The reason for the Joint Venture Doctrine is to prevent American officials from circumventing *Miranda* by having agents of a foreign government question a suspect for them. There is a deterrent effect to *Miranda* and the courts do not want that

deterrent effect circumvented by simply having a foreign official conduct an interrogation. The Ninth Circuit established this rule in 1973 in *United States v. Trenary* applying the concept of an agent of the police to interrogations. If a foreign agent were to question a suspect as a part of a joint venture, the agent would merely be an agent of the police and *Miranda* would apply. The Joint Venture Doctrine has been reaffirmed several times including in decisions by the Fourth Circuit in *United States v. Abu Ali* (2008), the Second Circuit in *In re Terrorist Bombings* (2008), and the Fifth Circuit in *Heller* (1980).

While the lower federal courts have created and accepted the Joint Venture Doctrine, they have failed "to define its precise contours" (*United States v. Yousef* 2003). Examining a few examples will help to explain when an investigation involves a joint venture and when it does not. *United States v. Hensel* (1981) involved an investigation of marijuana smuggling by boat off the coast of Maine. The case involved the chase and capture of a boat in Canadian waters with assistance from the United States Coast Guard. The pursuit of the boat was actually initiated by the United States who requested assistance from Canada as the boat fled toward Canadian waters and was eventually stopped in Canada. Members of the United States Coast Guard boarded the suspect ship and assisted with translation so that the members of the suspect crew could be questioned. The court noted "the United States Coast Guard instigated, coordinated, and closely collaborated with the Canadians in effectuating the seizure and search" (*United States v. Hensel* 1981, 1373). The investigation in Hensel was determined to be a joint venture, although the court said "the question is close" (*United States v. Hensel* 1981, 1372). In *United States v. Heller* (1980), the United States Secret Service provided a tip

to law enforcement officials in London, England about a counterfeit operation. The suspect was arrested and questioned by the British authorities and questioned by British authorities outside the presence of American officials. This was determined not to consist of a joint venture even though the suspect would not have been arrested if the United States agents did not provide the information to the British government. The Ninth Circuit determined that a joint venture occurred when the Drug Enforcement Agency (DEA) cooperated in an investigation with the Mexican government (*United States v. Emory* 1978). In *Emory*, the DEA participated in the arrest, provided the Mexican government with information about the illegal activity, coordinated the surveillance, supplied a pilot, gave the takedown signal for the arrest to occur, and observed the interrogation. The determination if a case is a joint venture requires an analysis of the facts of each case to determine of the level of cooperation by the United States was so substantial as to create a joint venture.

Two recent terrorism cases, *United States v. Yousef* and *United States v. Abu Ali*, involved claims of a joint venture. In *Yousef*, the defendant claimed he was kidnapped by Pakistani authorities and tortured by them. In addition to the torture by Pakistani authorities, he claimed to have been questioned by representatives of the Federal Bureau of Investigations. The court could not substantiate the allegations and determined that no joint venture existed. In contrast to *Yousef* where no questioning by American agents could be verified, in *Abu Ali* there is no doubt that American agents were involved in questioning the suspect, but the extent and control of the questioning was the issue. The court determined that the collaboration did not rise to a joint venture because the Americans were only able to suggest questions for a Saudi Arabian official to ask and the

majority of questions requested by the Americans were rejected. The Fourth Circuit reasoned that a joint venture required "active" or "substantial" participation on the part of the United States government and that mere presence during an interrogation did not create participation enough to amount to a joint venture.

Voluntariness

If a statement was made to a foreign agent that was not part of a joint venture investigation with the United States, the statement must be made voluntarily in order to be admissible in domestic American courts. In determining if a statement was made voluntarily, the courts rely on the pre-*Miranda* cases on voluntariness. The standard created in the line of cases from *Bram, Brown*, and *Culombe* forward look at the totality of the circumstances to see if a statement made was a free choice. Many of the cases look to *Schneckloth v. Bustamonte* (1973) to determine what factors should be considered. *Schneckloth* lists several factors that can influence a determination of voluntariness including

> the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep (1973, 225).

The determination of voluntariness can be difficult especially when the questioning occurred outside the United States.

Several terrorism cases focused on the voluntariness of statements made to foreign investigators. In *Abu Ali* the defendant was questioned by the Mabahith, an anti-terrorism unit of the Saudi Arabian government. The defendant in this case alleges that he was tortured by his Saudi Arabian interrogators and that his statements were not made

voluntarily, but were coerced. In making a determination on the allegations of torture, the trial court heard over twenty witnesses including medical experts who gave conflicting accounts of whether the defendant's body showed signs of torture. The Fourth Circuit Court of Appeals questioned the reliability of the defendant's testimony stating that his testimony did not flow logically and that he seemed to deflect questions. While the allegations of coercion were influenced by the trial court's view of the credibility of the witnesses, other factors were also considered.[5] Both the trial and appellate courts determined Abu Ali to be an intelligent, capable and articulate man who was familiar with the culture of Saudi Arabia. The appeals court noted that he was not advised of his legal rights and that he was held incommunicado, but the lack of notification and an attorney were only two factors. In determining whether Abu Ali's will was overborne and whether the statements he made were the product of a free and unconstrained choice, the appeals court determined that the totality of the circumstances indicated the statements were made voluntarily.

It is interesting to note what was not considered in the totality of the circumstances analysis. Neither the trial court nor the appellate court considered general evidence of torture or abuse by the government of Saudi Arabia by its prisoners. The trial court stated "the Court is mindful that there have been news reports accusing the Saudi government of engaging in and condoning torture or human rights violations" (*United States v. Abu Ali* 2005, 386). While the district court mentioned news reports, other reports including those of the United States Department of State make similar claims about human rights violations by the Saudi Arabian government (Said 2010, 27).

[5] The Court of Appeals for the Fourth Circuit reviewed the trail court's decisions and accepted the factual findings of the trial court. The Court of Appeals deferred to the credibility determination by the trial court.

While these claims were only general and not specific to the facts in *Abu Ali*, domestic criminal courts have considered general evidence of widespread abuse to assist in determining the outcome of a case.[6] Another implication of widespread abuse can be inferred from the testimony of a captain who questioned Abu Ali. According to the court, "The Captain said he has never had a suspect refuse to be questioned by him or to sign a written confession statement log. He has been an interrogator for seven years and, according to him, each person he questions confesses or gives a statement" (*Abu Ali* 2005, 347). The idea that knowledge of Saudi Arabian customs increases the likelihood that the statements were made voluntarily can also be questioned. It is possible that familiarity with Saudi Arabian culture and customs would lead a person to believe that if they did not cooperate during questioning, he would be tortured (Said 2010).

The trial court's determination of voluntariness in *Abu Ali* was based on the totality of the circumstances. The trial court did not believe the suspect was tortured or physically coerced. Despite the prolonged questioning, the trial court concluded that the defendant began confessing on the second day of questioning which indicated he was not tortured. The trial court also took into consideration the testimony that the defendant was provided numerous breaks during questioning, was properly feed, and not deprived of sleep. In reviewing the finding of voluntariness, the appellate court added that the defendant was intelligent, articulate and familiar with the culture and customs of Saudi Arabia. All of these factors lead to the conclusion that under the totality of the circumstances, the defendant provided a voluntary confession and that his will was not overborne.

[6] One example is the concurrence of Justice Douglas in *Furman v. Georgia* (1972) where studies showing that the death penalty was used disproportionately against African-Americans in discussing whether the imposition of the death penalty violated the Fourteenth Amendment Due Process Clause.

Another terrorism case that dealt with the issue of a voluntary statement was the *United States v. Abu Marzook*. The actual questioning and facts of *United States v. Abu Marzook* took place in 1993 although the case did not come to trial in the United States until 2004. Defendant, Muhammad Salah, was arrested and questioned by members of the Israeli government for his involvement with Hamas, an Islamic resistance movement (Said 2010). That arrest and questioning led to charges in the United States of providing support to a foreign terrorist organization. There are several similarities between this case and *Abu Ali*. In both cases the court ruled in favor of the government, both cases involve claims of torture, both cases involve an American citizen, and in both cases the suspect was denied access to an attorney. Similar to *Abu Ali*, the questioning of the suspect was done by agents of a foreign government and, similar to *Abu Ali*, the credibility of their testimony was important in the determination that statements made by the defendant were voluntary. Unlike *Abu Ali*, two statements were suppressed and not allowed in court. Both of these statements were written in Hebrew, a language the defendant did not speak or write. All other statements made by the defendant were determined to be voluntary.

The standard used to determine that the statements made by the defendant in *Abu Marzook* was also a determination of voluntariness based on the totality of the circumstances. The court examined the case to determine if, under the totality of the circumstances, the will of the defendant was overborne and if the decision to make the statements was a free choice. In making this determination the trial court took into account that the testimony of the Israeli agents was "forthright and truthful" (*Abu Marzook* 2004, 752). The court did not find that the defendant was deprived of sleep,

although the court did state that the suspect was questioned "in the middle of the night and for lengthy periods of time" but those claims did "not overcome the credible testimony of the witnesses regarding Salah's alert and rested state" (*Abu Marzook* 2004, 756). In evaluating the impact of the defendant not having access to an attorney on the voluntariness of the statements, the court found that the "Defendant received an attorney within the time limits provided under Israeli law" and the court did not determine this to be a factor creating an involuntary statement. A large component of the determination that statements made by the defendant were voluntary were based on audio recordings of interviews showing friendly exchanges and leading the court to determine that the defendant was acting "on his own free will" (*Abu Marzook* 2004, 771).

The ruling in *Abu Marzook* concerning the voluntariness of a fifty-three page statement written by the defendant raises an interesting question in light of the Supreme Court decision in *Arizona v. Fulminante* where the Supreme Court ruled that a confession to a cellmate was not voluntary because the cellmate offered protection in exchange for the a confession. In *Abu Marzook*, part of the interrogation involved placing the defendant in a prison along with collaborators of the Israeli government in order to obtain information. Much of the description of the operation has been redacted from the decision, but it is clear that the defendant wrote a fifty-three page statement with new information while he was in prison with the collaborators. The statement was made to the collaborators and then turned over to the interrogators. The defendant claims the statement the product of physical coercion and threats while the Israeli agents said that the defendant never complained about mistreatment by the collaborators in prison. The defendant was with the collaborators in prison for approximately one week. While much

of the information surrounding the operation is not known, the use of prison collaborators to produce a fifty-three page statement would appear to be contrary to *Fulminante*.

The two cases of *Abu Ali* and *Abu Marzook* highlight some of the difficulty in determining the voluntariness of statements. The standard used is whether under the totality of the circumstances the will of the suspect was overborne and whether the statements made by a free and unconstrained choice. Much of the determination for the court rests in which witnesses to believe. Said points out that government interrogators in both *Abu Ali* and *Abu Marzook* were representatives from a foreign government who testified under assumed names and would be unlikely to fear penalties for perjury. Of course, the court in both cases found inconsistencies in the statements of the defendants, finding them to lack credibility. Additional problems concern how to determine the actions that take place in foreign legal systems such as holding prisoners incommunicado and the techniques used in interrogation.

Shock the Conscience

While most of the cases concerning the admission of statements made to foreign officials center on the voluntariness of the statement, there is another standard that can be used. If the conduct of the government was so reprehensible as to shock the conscience, the statements must be excluded. This standard is most often associated with *Rochin v. California* when police officers illegally entered a suspects room to seize drugs, fought with a suspect, and then had his stomach pumped to obtain the evidence from his vomit without a search warrant. In applying this standard to interrogations overseas, there have been two different interpretations.

In *United States v. Yousef* (2003), the Second Circuit used the shock the conscience standard as an additional step in the analysis to determine of a voluntary statement made to a foreign official could be admitted into a domestic criminal court in the United States. After determining if a joint venture occurred, the court said "the second exception to the general admissibility of voluntary statements taken by foreign officials is that any such statements obtained under circumstances that "shock the judicial conscience" will be suppressed" (*United States v. Yousef* 2003, 146). *Yousef* makes the shock the conscience standard part of the analysis after a statement is determined to be voluntary. If neither a joint venture occurred nor techniques that shock the conscience were used and the statement was made voluntarily, it could be admitted into evidence.

The shock the conscience standard was used by the United States District Court for the District of Columbia in *United States v. Karake*, although the court in this case criticized the interpretation of the standard by the Second Circuit in *Yousef*. The decision in *Karake* questioned how a statement could be voluntary if the techniques used to illicit the statement shocked the conscience. The court in *Karake* saw them as two competing standards rather than complementary. According to the court, one standard is that a statement is admissible if it is voluntary while a second standard is that a statement can be admissible as long as the method used to obtain the statement did not shock the conscience. The decision in *Karake* claims that the confusion over the standards was created because the Second Circuit confused the standard for the Exclusionary Rule when applied for Fourth and Firth Amendments issues. While the *Karake* decision felt the shock the conscience standard was more appropriately applied to the Fourth Amendment, the decision did not determine which standard was appropriate to use in determining the

voluntariness of a statement made to foreign officials as the *Karake* court found the statements contested in *Karake* violated both the voluntariness and shock the conscience standards.

While *Karake* criticized the interpretation of the shock the conscience standard as applied by the Second Circuit, it provided an example of how the Second Circuit standard could be applied. *Karake* involved the questioning of suspects by FBI agents in Rwanda concerning the murder of two United States citizens. The defendants did not claim any mistreatment by the FBI agents or while the FBI agents were present. The statements made to them and in their presence were believed to be voluntary. The defense claimed that they were physically beaten outside the presence of the FBI agents, often prior to questioning, and that they were also beaten when questioned by Rwandan officials. They further claimed they were intentionally deprived of food and sleep as well as forced to endure other forms of duress such as positional torture. The court determined that the statements made to the Rwandan officials were the product of coercion and that the totality of the circumstances concerning their detention "shock the conscience and therefore render the statements involuntary and inadmissible" (*United States v. Karake* 2006, 86).

While the statements made to FBI agents may not have been the product of coercion on the part of the FBI, the coercive tactics of the Rwandan officials and the conditions under which they were held shocked the conscience. While criticizing the interpretation of the Second Circuit, *Karake* also provides an example of how it can be applied. Further cases may use the shock the conscience standard to apply to conditions and actions that take place outside the questioning of suspects.

Justice Felix Frankfurter wrote the majority opinion in *Rochin* advocating that the Due Process Clause of the Fourteenth Amendment applied to the states in cases that "shock the conscience." Justice Hugo Black concurred in the result but wrote an opinion similar to his opinion in *Adamson* stating that the Due Process Clause applied to the entire Bill of Rights rather than to rights chosen by judges. It is possible that this debate may again apply to the statements of terrorist suspects as courts struggle to determine what due process rights are required for suspects declared enemy combatants, suspects held outside the United States, and for defendants subject to extreme interrogation techniques. The application of due process rights in these conditions may give rise to the arguments between Frankfurter and Black concerning how to determine the what due process rights apply to these unique defendants.

Advice of Rights

While there are certain challenges in admitting statements made to officials of a foreign government, there are circumstances where American investigators need to question suspects outside the United States. While the purpose of questioning can be for many reasons, if the investigators wish to build a prosecutable case for trial in domestic criminal courts, there are issues of *Miranda*. The warnings in *Miranda* state that a suspect has the right to an attorney and that if the suspect cannot afford an attorney one will be appointed for them. Obviously, if a suspect is in the custody of a foreign government, the American officials cannot guarantee access to an attorney.

When a suspect is in custody outside the United States, American agents use an Advice of Rights (AOR) form to comply with *Miranda* and obtain statements that can be

used in a domestic criminal court. The AOR provides warning similar to *Miranda* to inform a suspect of his rights and accurately explains what rights are available as well as what rights would be available if the suspect were in the United States. In *California v. Prysock*, the Supreme Court determined that *Miranda* warnings do not have to contain certain precise language and that "no talismanic incantation was required to satisfy its strictures" (1981, 360). In *In re Terrorist Bombings*, the Second Circuit said:

> Miranda requires government agents to be the conduits of information to detained suspects--both as to (1) their rights under the U.S. Constitution to the presence and appointment of counsel at custodial interrogations and (2) the procedures through which they might be able to vindicate those rights under local law (2008, 208).

The Second Circuit went on to say that the ability to provide an attorney would depend on local law, but United States agents did not have to be advocates for the rights of the accused, but they also could not question a suspect who requests an attorney just because an attorney is not available. The United States agents are required only to make "an honest, good faith effort to provide accurate information" (*In re Terrorist Bombings* 2008, 208).

In re Terrorist Bombings involved the investigation of the embassy bombing in Nairobi, Kenya where two suspects were questioned while held in Kenyan custody.

The AOR provided to both suspect was similar stating:

> We are representatives of the United States Government. Under our laws, you have certain rights. Before we ask you any questions, we want to be sure that you understand those rights.
>
> You do not have to speak to us or answer any questions. Even if you have already spoken to the Kenyan authorities, you do not have to speak to us now.
>
> If you do speak with us, anything that you say may be used against you in a court in the United States or elsewhere. In the United States, you would have the right to talk to a lawyer to get advice before we ask you any questions and you could have a lawyer with you during questioning. In the United States, if you

> could not afford a lawyer, one would be appointed for you, if you wish, before any questioning.
>
> Because we are not in the United States, we cannot ensure that you will have a lawyer appointed for you before any questioning.
>
> If you decide to speak with us now, without a lawyer present, you will still have the right to stop answering questions at any time.
>
> You should also understand that if you decide not to speak with us, that fact cannot be used as evidence against you in a court in the United States.
>
> I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me. (*In Re Terrorist Bombings* 2008, 181).

The AOR is simple, although more detailed than a normal *Miranda* rights form used in domestic criminal cases. The important difference is that the United States representatives cannot promise access to an attorney nor can the representatives provide an attorney. Both suspects in the case made equivocal statements requesting an attorney at different points during their interrogation but they both eventually recanted that request and continued the questioning. In addition to being provided the AOR, both suspects were orally advised of their rights under *Miranda* at different points during the questioning. The court in this case did not definitively rule on the AOR because the *Miranda* warnings provided to the suspect met the constitutional requirements. While not definitively ruling on the AOR, the court said "the AOR substantially complied with whatever Miranda requirements were applicable" (*In re Terrorist Bombings* 2008, 209).

The voluntariness of the statements made under the AORs were also questioned due to the conditions of confinement. Both suspects were held incommunicado for fourteen days while they were being questioned. While the court ruled that the statements made by the suspects were voluntary, both suspects pointed to the coercive nature of their detention. Al-'Owhali claimed that the only way he could have access to

an attorney was admit to involvement in the bombing and be charged for the offense in the United States where an attorney would be provided to him. Odeh claimed his choice was between being interrogated by the Kenya police alone or being interrogated by the Kenyan police and the American officials. In both cases the court looked at the totality of the circumstances including the signed AOR forms and the education of the suspects to determine that the statements made were voluntary and admissible in domestic criminal courts.

Public Safety Exception

As mentioned at the beginning of this chapter, one of the most discussed exceptions to *Miranda* is the public safety exception. This exception was announced by the Supreme Court in 1984 in the case of *New York v. Quarles* to allow for the admission of statements outside of *Miranda* that are "reasonably prompted by a concern for the public safety" (*Quarles* 1984, 656). This case is important for terrorism jurisprudence because it creates the legal reasoning for questioning a suspect in custody outside of *Miranda*. While the prosecution of terrorists is an important goal of the government, most consider the protection of the public from harm more important. When a terrorist is captured, particularly soon after an event has occurred, the government may determine there is a need to obtain quick answers to make sure there is no imminent threat or act of violence that is about to occur. In *Quarles,* the imminent threat to the public was an unsecured handgun that could have been picked up by any member of the public including children or, as Justice Rehnquist pointed out in the majority opinion, it could have been used by an accomplice to the suspect.

The facts of *United States v. Khalil* help bolster the need for a public safety exception. In July of 1997, the roommate of Lafi Khalil and Gazi Ibrahaim Abu Mezer informed the New York City Police Department of a plan to detonate bombs for the purpose of killing innocent civilians. Khalil and Abu Mezer were angry because of the policy of the United States toward Palestine and specific incidents that occurred between Israel and Palestine. In retaliation, they planned to place bombs in a crowded bus or subway terminal and detonate them. The roommate gave the police information about where the bombs were held in the apartment. When the police conducted a raid on the apartment, they found Khalil and Abu Mezer on the floor in the bedroom where the bombs were said to be located. One of the defendants lunged at the police grabbing a gun while the other moved toward a bag that contained the bombs. Both men were shot and wounded. Khalil and Abu Mezer were taken to a hospital for treatment. When the police looked inside the bag, they saw wiring and what appeared to be pipe bombs. A switch on one of the bombs appeared to have been flipped.

Fearing that the bombs would detonate before they could be disarmed, Abu Mezer was questioned at the hospital about the bombs. He was not read his *Miranda* rights although he was no doubt in custody. Abu Mezer was questioned about the number of bombs, the number of switches on each bomb, which wires needed to be cut to disarm the bomb, if any timers were present, and if he intended to kill himself in detonating the bombs. Abu Mezer answered each question. The defense claimed that the last question about whether he planned to kill himself in the attack fell outside the public safety exception. The court disagreed stating “Abu Mezer's vision as to whether or not he

would survive his attempt to detonate the bomb had the potential for shedding light on the bomb's stability" (*Khalil* 2000, 121).

It would be difficult to create a circumstance more in need of the public safety exception than the facts in *Khalil*. The police were dealing with two individuals whom they were told by the suspects' roommate intended to explode bombs for the purpose of killing innocent civilians in New York City. When the police conducted a search of the apartment, they encountered both suspects, struggled with the suspects, and shot both suspects. One suspect lunged for what was determined to be a bag containing bombs. The bombs appeared to have several switches some of which had been activated increasing the concern that the bombs might explode. In asking about how to disarm the bombs, the police also asked if the suspects planned to live through the incident to which Abu Mezer merely responded "poof" (*United States v Khalil* 2000, 115). While all of the other questions concerned the specifics of disarming the bombs, the last question was more of a question of the motivation and tactics for carrying out the bombing. The discussion of the public safety exception in *Khalil* is brief, but important. *Khalil* provides one of the few applications of an exception to *Miranda* that may become more common.

Discussion and Examples of the Development of Law

The decision by the Supreme Court in *Miranda v. Arizona* was not the last word on confessions. The law on confessions is shaped as courts interpret *Miranda* and other related decisions. As terrorism cases enter the judiciary, they will add to the cases and precedent related to confessions and admissions. William Stuntz thought that "The social cost of *Miranda* may have risen dramatically on September 11" (Stuntz 2001, 2150). In

discussing the possible influence of terrorism cases on the judiciary he suggested that "changes in the world of crime ought to be taken into account when considering the merits of the many legal rules that govern policing" (Stuntz 2001, 2150). Stuntz advocated for changes in how the judiciary viewed *Miranda* and other criminal justice rules in response to the threat of terrorism. Other scholars such as Richard Posner, Eric Posner, and Adrian Vermeule have advocated a similar position (E. Posner and Vermeule 2007; R. Posner 2006a). With such influential legal scholars advocating for a change in criminal justice rules in response to the increased threat, it is important to examine the terrorism cases that decided by the judiciary and see what influence they have had.

To understand the development of law and how precedent can influence cases, it is helpful to look at specific cases where the precedents were used and how the precedents were applied. The terrorism data set contains 43 parent cases (precedents) that were cited 449 times. The citations do not include string citations or citations with neutral treatment, but cases in which the precedent was treated positively or negatively. The citations involve many different issue areas including both civil and criminal cases. As stated above, when a precedent is created it can be cited for a variety of reasons. Of particular interest to this research is how changes in society influence the development of law in criminal justice cases. To assist in this understanding it is useful to simply examine the facts associated with the precedents and then how those facts were used in the cases that cited them. The following section examines precedents from the terrorism data set and how they were used in criminal justice cases.

The cases used in this data set are from the United States Courts of Appeals. The parent cases were identified by examining the charges used to prosecute terrorism cases

and searching for cases that reached the circuit court of appeals level. After these cases were identified, Shephard's Citations were used to identify the which cases cited the parent case. The cases were coded for several different variables including the area of criminal justice involved. The cases used in this analysis represent all of the terrorism cases from the federal appeals court dealing with *Miranda* that have been cited more than once. There are only a small number of terrorism cases that have reached the circuit courts of appeals level. The cases dealing with *Miranda* issues were the largest group of cases on a common criminal justice issue so they were used in this analysis. Following the discussion of *Miranda*, one additional cases was used to highlight how terrorism cases may be influential in other areas.

United States v. Yousef's Impact on Miranda

United States v. Yousef (2003) is a case from the United States Court of Appeals for the Second Circuit arising out of the first bombing of the World Trade Center on February 26, 1993, and the attempted bombing of United States commercial airliners. Eyad Ismoil and Ramsey Yousef were convicted for their involvement in the first World Trade Center bombing that killed six people and wounded thousands. Abdul Murad and Ramsey Yousef were convicted for their involvement in plots to blow up airliners, although none were successful. Each of the defendants made statements to government officials that implicated them in the criminal acts.

The defendants claimed that their statements were made in violation of *Miranda* and should be suppressed. Ismoil was captured in Jordan in March of 1995 where he made written and oral statements to Jordanian officials about his involvement in the

bombing. He admitted to driving the van, but said he did not know it contained a bomb. Yousef was apprehended in Pakistan on February 7, 1995. He made statements to FBI agents while on a plane from Pakistan to the United States after waiving his Miranda rights. Murad was captured in the Phillipines and was questioned by FBI agents during a flight to the United States.

Ismoil claims that *Miranda* applied to his interrogation because it was a joint venture between Jordan and the United States. He also claims that the statements were not voluntary. The claim of joint venture were based on a request from the United States to assist in the apprehension of Ismoil and that he heard English being spoken on the phone during his questioning. He argued that his statement was not voluntary because his interrogator assured him that his statement would not be turned over to American authorities. The court ruled against him on both counts because the level of cooperation was not enough to amount to a joint venture and because his voluntariness claim "lacks foundation and merit" (*Yousef* 2003, 146).

Yousef and Murad contested their statements because they involved coercion by foreign government agents. Prior to being turned over to American agents, Murad alleged that he was beaten while in the custody of the Philippine government. He claimed the torture prior to being turned over to the FBI left him "mentally incapable of making a voluntary confession" (*Yousef* 2003, 126). The Second Circuit Court of Appeals disagreed with this argument because the circumstances of his questioning by FBI agents was not coercive and because he made a knowing and voluntary waiver of his rights. Yousef's Fifth Amendment claim was similar to Murad in that he claims torture while in the custody of the Pakistani government caused his statements to FBI agents to

be involuntary. Yousef's claim was similarly dismissed because the coercion did not occur while in the custody of the United States government.

New Hampshire v. Mann is a state court case involving a murder charge that cites *Yousef* concerning the admissibility of statements made to an official of a foreign government outside the United States. The defendant in *New Hampshire v. Mann* was charged with murder in the Superior Court of New Hampshire, Hillsborough County, Southern District in the death of the defendant's wife. After being apprehended in Canada, the defendant was advised of his rights under Canadian law which includes the right to an attorney as well as a toll free phone number to access a free attorney. The defendant told the first officer he spoke with that he wanted an attorney, but was questioned by two more officers. During those interrogations, after answering a few questions, he said he no longer wanted to answer questions. There is no requirement under Canadian law that officers stop questioning when the suspect requests an attorney. The court in this case determined that all of the statements made by the defendant would likely be suppressed if made to American law enforcement.

The New Hampshire state court used *Yousef* to determine how to apply *Miranda* in this case. The court determined that *Miranda* did not apply using *Yousef* to support this conclusion and stating

> The New Hampshire Supreme Court has not addressed the issue of whether statements made to foreign law enforcement officials in a foreign country are admissible when the requirements of Miranda were not followed. However, other state and federal courts have found that custodial interrogations by foreign law enforcement officials outside the United States are generally not governed by Miranda. (*New Hampshire v. Mann* 2005, 13).

The New Hampshire Court also determined that the case did not shock the conscience nor involve a joint venture, but *Yousef* was not cited in relation to those conclusions. The defendant's motion in *New Hampshire v. Mann* to suppress his statements to Canadian authorities was denied.

Similar to *New Hampshire v. Mann*, *United States v. Navarro-Montes* dealt with how to apply *Miranda* to questioning by a foreign official (2011). This case from the United States District Court for the Southern District of California (Ninth Circuit) involved a suspect who was wanted in the murder of a border patrol agent in the United States and subsequently fled to Mexico. The suspect in this case made incriminating statements while in the custody of Mexican authorities, but claimed those statements should be suppressed because they were made in violation of *Miranda* and that the investigation that lead to the capture of the suspect was a joint venture. The defense claimed that a joint venture occurred because the United States requested assistance from the Mexican government, sent an extradition request to the Mexican government, provided the Mexican government with the location of the defendant, and had an officer to act as a liaison with the Mexican officials working on the case. In determining if the cooperation amounted to a joint venture, this court looked outside of its circuit and quoted *Yousef* as saying

> [E]vidence that the United States may have solicited the assistance of a foreign government in the arrest of a fugitive within its borders is insufficient as a matter of law to constitute United States participation under the joint venture doctrine . . . United States law enforcement officers are not required to "monitor the conduct" of foreign officials who execute a request for extradition or expulsion. (*United States v. Navarro-Montes* 2011, 13-14 quoting *United States v. Yousef* 2003, 236 quoting *United States v. Lira*, 1975, 71).

The district court in this case determined that the contact between the United States official and Mexican officials followed standard operating procedures and did not amount to a joint venture and that the requirements of *Miranda* did not apply to any statements made by the defendant to Mexican officials and that they could be used in the trial against the defendant.

Of the cases that cite *Yousef* related to its *Miranda* decisions, only one case did not involve the charge of murder (*United States v. Lopez-Imitola* 2004). This case from the District Court for the Southern District of New York in the Second Circuit involved a suspect who was accused of importing "massive amounts" of heroin into the United States using Columbia as a base of operations. The United States Drug Enforcement Administration (DEA) requested assistance from the Columbian government in capturing the defendant and informed officials from the Columbian government of his location. He was located and arrested by members of the Columbian National Police (CNP) and made incriminating statements to the CNP after his arrest. This case from the United States District Court for the Southern District of New York cited *Yousef* as a precedent from its own circuit in a similar manner to *Navarro-Montes*, even quoting the same excerpt from the case:

> As a matter of law, "evidence that the United States may have solicited the assistance of a foreign government in the arrest of a fugitive within its border is insufficient . . . to constitute United States participation under the joint venture doctrine (United States v. Navarro-Montes 2011, 13-14 quoting United States v. Yousef 2003, 236 quoting United States v. Lira, 1975, 71).

The court in this case also found that no joint venture existed between the Columbian government officials and officials from the United States government so *Miranda* did not

apply and the statements the defendant made to the CNP could be used against him in his trial in the United States.

The case of *People v. Gomez-Garcia* from the Court of Appeals of Colorado, Division Seven is similar to the above cases, but extends the *Miranda* exceptions a bit further (2009). The suspect in this case shot two police officers who were working security outside of an invitation-only party because they would not let him enter. One police officer died while the other escaped serious injury. The suspect fled to Mexico after the shooting. The United States requested assistance in apprehending the suspect and an official from the United States government traveled to Mexico to assist in locating him. When the suspect was arrested, the United States official was in a car outside the location where authorities apprehended the suspect and the United States official was present when he made inculpatory statements about the shooting.

Yousef is cited to assist in determining if the cooperation between the United States official and the Mexican officials amounted to a joint venture. The *Gomez-Garcia* court determined that *Miranda* "warnings are required, only if American agents 'actively participate in questioning conducted by foreign authorities' or somehow 'use foreign officials as their interrogation agents in order to circumvent the requirements of Miranda.' (*People v. Gomez-Garcia* 2009, 1022 quoting *United States v. Yousef* 2003, 145-46). The Colorado court determined that since the Mexican authorities were not acting as agents of the United States government, there was deterrent effect in applying the Exclusionary Rule to the statements taken outside of *Miranda*. The statements were allowed to be used in the criminal trial against the defendant.

United States v. Abu Ali (2005) is a case from the United States District Court for the Eastern District of Virginia (Fourth Circuit) involving an American defendant who was arrested by the Saudi Arabian government for involvement in bombings in Saudi Arabia. While in custody, Saudi Arabian officials learned that he was involved in plots to commit acts of terrorism in the United States and informed the American government. The suspect made incriminating statements to officials of the Saudi Arabian government which the defense attempted to have suppressed at his trial. *Yousef* was quoted by the district court concerning the standard for the admission of statements made to foreign officials. The court determined "It is well established that statements obtained by foreign police in the absence of a Miranda warning are admissible, if made voluntarily" *Abu Ali* 2005, 381 citing *Yousef*). While there were allegations of coercion by the defense, the court determined that the statements made to officials of the Saudi Arabian government were voluntary and could be used in court against the defendant in the United States.

Another case involving an American citizen arrested by a foreign government is *United States v. Marzook* (2006) from the United States District Court for the Northern District of Illinois (Seventh Circuit). The defendant in *Marzook* made statements to agents of the Israeli government which were presented during his trial in the United States. The defense challenged the admission of these statements as a violation of *Miranda* because the defendant requested an attorney. The court in this case cited *Yousef* concerning the standard for the admission of statements made to a foreign official using a similar quote as mentioned above in *Abu Ali*, "statements made to foreign police or officials in the absence of Miranda warnings are admissible in a United States court, if the defendant made them voluntarily" (*United States v. Marzook* 2006, 743, citing *Yousef*

2003, 145). *Yousef* is also cited in reference to the standard for a joint venture to exist stating "a joint venture nonetheless exists if the American law enforcement agents used the foreign officials … in order to circumvent Miranda's mandates" (*United States v. Marzook* 2006, 744, citing *Yousef* 2003, 145-146). In determining how to assess the request for an attorney by the defendant in this case, the court quotes *Yousef* as saying, "a request for counsel in the context of an investigation conducted solely by foreign officials does not, in itself, amount to an invocation of the right to counsel with respect to United States proceedings (*Marzook* 2006, 744, quoting *Yousef* 2003, 142). In denying the request to suppress the statements made to Israeli agents, the court in *Marzook* cited analysis from *Yousef* that a request for an attorney made to foreign officials in another country "cannot be extended to require the United States officials to proceed as if that request was made of them" (*Marzook* 2006, 759, quoting *Yousef* 2003, 142). The court in *Marzook* determined that the rights under *Miranda* including a request for an attorney cannot be applied to statements made to foreign officials and that those statements can be used on domestic criminal courts.

While all of the cases above cite *Yousef* and allow the statements to be used in court, *United States v. Karake* is a case where statements were suppressed. *Karake* involves the murder of American citizens in Rwanda and the admissibility of statements made to FBI agents while the suspects were in the custody of the Rwandan government. This case from the United States District Court for the District of Columbia (D.C. Circuit) suppressed the statements as involuntary due to the conditions and treatment of the detainees in prison, not because of any coercion by the FBI. *Karake* criticizes the ruling in *Yousef* as confusing the standard in determining when statements made to

foreign officials can be admitted. The ruling in *Karake* states that there are two standards for allowing statements made to foreign officials into court: voluntariness and shock the conscience. Under the first standard statements can be admitted if voluntary and under the second, statements can be admitted if they were not obtained in a manner that shocks the conscience. The decision in *Karake* claims that *Yousef* confuses the standard by saying that statements are admissible if they both are voluntary and that the methods used to obtain the statements did not shock the conscience. The ruling finds that "It is hard to imagine a statement that could be "voluntary," … but that had been obtained by methods that shock the judicial conscience" (*United States v. Karake* 2006, 52). The decision in *Karake* is that statements violating the shock the conscience standard would also violate the voluntariness standard.

Karake also cites *Yousef* concerning the standard for a joint venture. *Karake* involves cooperation between the FBI and officials from the Rwandan government. While the court found that the conditions of the confinement prevented the suspects from providing a knowing and intelligent waiver of their rights after the FBI agents arrived and began questioning the suspects, the court did allow previous statements made while the defendants were held at a separate location. Because there was no action "designed to evade the constitutional requirements applicable to American investigators" the statements made prior to the involvement of the FBI agents could be used in American courts as there were no allegations of physical abuse prior to the arrival of the American agents.

Yousef is an important precedent because it is used in many different circuits. The only case from the same circuit as *Yousef* (Second Circuit) to cite it as precedent for the

application of *Miranda* is *Lopez-Imitola*, a drug case. All of the other cases are from a different circuit and involve terrorism charges or a charge of murder. All of the cases involve statements made to officials of a foreign government and the only case where the statements were suppressed is *Karake*. In *Marzook* and *Mann*, the suspects requested an attorney, but since the requirements of *Miranda* did not apply and the courts in both cases determined that the statements were voluntary, the statements were admitted.

Yousef is cited in reference to the application of *Miranda* when suspects are questioned by foreign officials. The requirements of *Miranda* were created because the courts felt trying to determine if a defendant felt free in his choice to make a statement was difficult to determine and relied on the subjective evaluation of the knowledge of the suspect. *Miranda* provided specific actions that made determining the voluntariness of a statement easier to determine. In *Marzook* and *Mann*, both defendants specifically requested an attorney, but the laws in those countries did not require the questioning to stop until an access to an attorney was provided. Only one of the cases that cites *Yousef* in reference to *Miranda* is from the same circuit (*Lopez-Imitola*). The other cases cite *Yousef* as persuasive precedent and both the state court cases (*Gomez-Garcia* and *Mann*) specifically state that there is no precedent to follow in their own state court system.

The first bombing of the World Trade Center and the attempted bombing of American airliners are high profile cases involving the security of the United States. The decision in *Yousef* from the United States Court of Appeals for the Second Circuit was handed down less than two years after the terrorist attacks of September 11, 2001. Overturning the convictions in this case would create security concerns for the United States. The precedents created by the case can be used in the prosecution of other

terrorism cases and assist in obtaining evidence that can be used against the suspects in domestic criminal cases. The use of those precedents is not limited to terrorism cases. All of the cases that cite *Yousef* about the admission of statements made to foreign officials involve serious charges. This is to be expected as there is a great deal of expense involved in trying an international case. The rights of *Miranda* were created out of the need determined by the Court to ensure the voluntariness of statements. Precedents from terrorism cases such as *Yousef* allow statements which violate the reasoning behind *Miranda* to be used in domestic criminal courts. Criminal procedure law in the United States is created incrementally as precedents are created and *Yousef* provides an example of how the prosecution of terrorism cases influences the direction of criminal procedure law in the United States.

In Re Terrorist Bombing's Impact on Miranda

The bombing of the United States embassy in Nairobi, Kenya on August 7, 1998, produced an investigation that included the United States government and the Kenyan government among others. Two suspects were identified and arrested for their roles in the bombing with the case being known as *In re Terrorist Bombings* (2008).[7] There are several trials with the same name that produced precedents from the Court of Appeals for the Second Circuit. The two suspects in this case, Mohammed Rashed Daoud Al-'Owhali and Mohammed Sadeek Odeh, were held in Kenya where they were questioned by members of the United States government and the New York City Police Department.

[7] There were three cases with very similar names handed down at the same time. This case refers to *In re Terrorist Bombings*. 552 F. 3d 177 (2nd Cir 2008) which dealt with the *Miranda* issues in this case.

At the beginning of his questioning, Al-'Owhali was informed of his rights through an AOR[8] in English. Al-'Owhali informed the agents that he could not read English and had limited understanding of spoken English. In response, one agent read the AOR to Al-'Owhali slowly in English and Al-'Owhali signed the form in Arabic. Later that day, an interpreter was used for questioning. The interpreter translated the AOR and read it to Al-'Owhali who agreed to speak with the investigators. Eventually, Al-'Owhali agreed to tell the investigators everything he knew if he could be tried in the United States. A United States government attorney was brought in and an agreement was signed stating Al-'Owhali's preference to be tried in the United States, but not guaranteeing him that he would be tried there. Al-'Owhali then mentioned that he might wish for an attorney to review the document. The American attorney then advised Al-'Owhali of his *Miranda* rights through an attorney. As the request was being investigated, Al-'Owhali agreed to speak without an attorney and subsequently confessed to his role in the bombing.

Odeh was similarly advised of his rights using an AOR form, although Odeh spoke much better English. Odeh brought up the issue of his admissions to Pakistani authorities shortly after his capture at the Karachi airport. He was told that the Americans did not know about those statements. After being advised of his right to an attorney, Odeh asked about the availability of an attorney. The American officials were told that under Kenyan law an attorney was not provided and it was their practice to continue the questioning. Again, a United States government attorney entered the room and explained the limitations on the United States providing an attorney to Odeh. He then read Odeh the standard *Miranda* warnings. Odeh then asked about speaking to the

[8] Advice of Rights similar to providing *Miranda* warnings, but they are adapted for use overseas.

Americans outside the presence of the Kenyans, but as that option was being discussed he changed he mind and agreed to speak to both groups. Odeh eventually admitted to being a member of al Qaeda, but denied involvement in the bombing.

Both Al-'Owhali and Odeh were held incommunicado for fourteen days during their questioning. Their confinement did not mean that they could not talk to anyone, but that they could not have contact with anyone outside the prison. The court did not find that the incommunicado confinement created a coercive atmosphere. The court looked at the ability of the suspects to understand English, the size of the cells they were held in, the congenial nature of the questioning, the availability of food and water, the education level, and the experience of the defendants to find that the statements made were not coercive. The court decided under the totality of the circumstances that the will over the defendants was not overborne.

As mentioned previously, during Odeh's initial questioning, he asked about the statements he made to the Pakistani authorities shortly after he was captured. The court notes that "the Americans did not know or care about what had transpired in Pakistan" (*In re Terrorist Bombings* 2008, 184). Eventually, the statements made to Pakistani authorities were submitted for use in the trial against Odeh and he did not contest the statements "on grounds related to his religious beliefs" (*In re Terrorist Bombings* 2008, 187). The admission of similar statements made prior to any warnings and after he was informed of his AOR could present a question similar to *Missouri v. Seibert* which specifically prohibits a similar tactic used in domestic law enforcement. *Seibert* declared that interviewing a suspect without *Miranda*, obtaining a confession, and then reading *Miranda* and obtaining a second confession violated the constitution. *Seibert* described

this strategy as "draining the substance out of *Miranda*" (2004, 616). While this strategy was not cited by any of the progeny of *In re Terrorist Bombings*, it is possible that future precedents from terrorism cases could pull the court away from *Seibert* since terrorism cases are often international in nature.

These provisions of Miranda were cited by three cases. *United States v. Clarke* (2009) and *United States v. Straker* (2009)[9] are cases involving the same defendant from the United States District Court for the District of Columbia. These cases involve the murder of a United States citizen in The Republic of Trinidad and Tobago in which the defendant made incriminating statements both to the Trinidad police and to the FBI. Similar to the decision in *In Re Terrorist Bombings* above, the questioning of suspects took place outside the United States while the suspects were in the custody of a different government. *In re Terrorist Bombings* was cited for several reasons including as authority to show that Fifth Amendment protections against self-incrimination applies to non-citizens questioned outside the United States. The Trinidad police did not inform the suspect that a lawyer could be provided for him, but "no such warnings were required because appointment of counsel to the indigent during interrogation is not required under Trinidad law" and *In re Terrorist Bombings* was cited in support of this (*United States v. Straker* 2009, 107). Concerning the statements made to the FBI, *In re Terrorist Bombings* was cited to show that the AOR form used "substantially complies with the cautions required by Miranda and contains permissible adaptations to describe accurately the availability of counsel to a detainee held by a foreign authority (*Straker* 2009, 108). While *Straker* is not in the same circuit as *In re Terrorist Bombings*, it was cited for

[9] *United States v. Clarke*, 611 F. Supp. 2d 12 (2009) and *United States v. Straker*, 596 F. Supp. 2d 80 (2009). These cases have the same defendants and are rulings issued by the same judge.

several issues in this case in relation to the application of *Miranda* and the Fifth Amendment.

United States v. Artis (2010) is a drug case from the United States District Court for the District of Vermont in the Second Circuit where the suspect was charged with distributing heroin and aiding and abetting another to make a false statement about a firearm. The defendant was questioned while he was in custody at the Rikers Island Correctional Facility concerning his experience selling drugs and his possession of a handgun during his arrest. The defendant in *Artis* signed a *Miranda* waiver and spoke with detectives. He later filed a motion for his statements to be dismissed saying he did not voluntarily waive his *Miranda* rights. *In re Terrorist Bombings* is used in the voluntariness analysis stating "the inquiry into the knowing and voluntariness of a waiver is 'directed to a defendant's state of mind, which can be inferred from his actions and statements'" (*Artis* 2010, 21-22, quoting *In re Terrorist Bombings* 2008, 211, quoting *United States v. Spencer* 1993, 11). In addition to challenging the voluntariness of his *Miranda* waiver, the defendant in *Artis* challenged the voluntariness of his statement. The ruling in *Artis* quotes *In re Terrorist Bombings* for the standard on voluntariness, "In determining whether statements are voluntary, a court "must examine the totality of the circumstances. Specifically, these circumstances include 1) the accused's characteristics, 2) the conditions of the interrogation, and 3) the conduct of the police" (*Artis* 2010, 26 quoting *In re Terrorist Bombings* 2008, 213).

In re Terrorist Bombings is another case where *Miranda* has to be flexible to fit the situation. This means that *Miranda* is not strictly followed, but exceptions are allowed. In *Straker* and *Clarke* it allows for the government to question a suspect while

providing a looser standard for the requirement of an attorney than would be allowed in the United States. When a detective from a local police department interviews a suspect, the detective cannot provide an attorney to the suspect, but rather the court has the power to assign an attorney. While the difference and the expansion may be minimal, the overseas investigation may also wait until the court appoints an attorney similar to a domestic criminal investigation rather than leave the decision on an attorney to the government of the host country.

The analysis in *Artis* is also informative concerning the influence of *In re Terrorist Bombings* to common criminal justice cases. The voluntariness of both the *Miranda* waiver and the voluntariness of the statement are compared to the standard for voluntariness in *In re Terrorist Bombings*. In *In re Terrorist Bombing*, the suspects were held incommunicado and the defendants requested to be tried in United States courts rather than Kenyan courts. They had an incentive to cooperate with the United States officials because they could not see individuals from outside the facilities and the officials of the United States government may have been their only access to the outside world to get out of their conditions. Comparing their positive demeanor as a sign of voluntariness again may not be a large expansion of *Miranda*, but it appears to be a more relaxed standard than using a domestic criminal justice case as a precedent. It is also another example of *In re Terrorist Bombings* being cited in a routine act of the criminal justice system.

Similar to *Yousef* above, *In re Terrorist Bombings* is cited inside and outside of its circuit (Second Circuit). *Clarke* and *Straker* are in the D.C. Circuit and *Artis* is in the Second Circuit. Again, similar to *Yousef*, the cases from outside the circuit that cite the

parent case are murder cases and the case from inside the circuit is not a capital case. *Artis* appears to be just a routine gun possession case with no unusual circumstances that would require a terrorism case to be used a precedent.

United States v. Khalil and the Public Safety Exception

An important aspect of terrorism cases that may be influential on the development of law is the need to obtain information quickly. The Second Circuit case of *United States v. Khalil* (2000) provides an example of the need for immediate information to prevent innocent people from being seriously injured. The legal discussion concerns the public safety exception to *Miranda*.

The facts in *Khalil* were stated previously, but they bear repeating. In July of 1997, the roommate of Lafi Khalil and Gazi Ibrahaim Abu Mezer informed the New York City Police Department of a plan to detonate bombs for the purpose of killing innocent civilians. Khalil and Abu Mezer were angry because of the policy of the United States toward Palestine and specific incidents that occurred between Israel and Palestine. In retaliation, they planned to place bombs in a crowded bus or subway terminal and detonate them. The roommate gave the police information about where the bombs were held in the apartment. When the police conducted a raid on the apartment, they found Khalil and Abu Mezer on the floor in the bedroom where the bombs were said to be located. One of the defendants lunged at the police while the other moved toward a bag that contained the bombs. Both men were shot and wounded. Khalil and Abu Mezer were taken to a hospital for treatment. When the police looked inside the bag one of the

suspects was trying to reach during the raid, they saw wiring and what appeared to be pipe bombs. A switch on one of the bombs appeared to have been flipped.

Fearing that the bombs would detonate before they could be disarmed, Abu Mezer was questioned at the hospital about the bombs. He was not read his *Miranda* rights although he was no doubt in custody. Abu Mezer was questioned about the number of bombs, the number of switches on each bomb, which wires needed to be cut to disarm the bomb, if any timers were present, and if he intended to kill himself in detonating the bombs. Abu Mezer answered each question. The defense claimed that the last question fell outside the public safety exception. The court ruled that whether or not Abu Mezer planned to live through the bombing shed light on the stability of the bombs and permitted the question to be used in court.

Khalil was cited by a district court case from the Second Circuit and then on appeal by the Court of Appeals in *United States v. Reyes* (2003). In *Reyes*, detectives with the New York City Police Department were conducting an operation on a heroin dealer. The take down of the suspect took place in the Bronx in front of a bodega and across the street from a school at 4:30 in the afternoon. The informant working with the police told the officers that the suspect normally carried a handgun with him and a shotgun in his vehicle. The police officers moved in and arrested the suspect. As the suspect was being arrested and before he was handcuffed, the arresting officer asked the suspect if he had anything that could hurt him or the other officers. The suspect responded that he had a gun in his pocket. Before searching the suspect, the officer again asked him if he had anything that could hurt the officer and the suspect responded that he

had drugs in the car. This is an important statement as it connects the suspect to the contraband.

The district court opinion in *Reyes* initially suppressed the statement. In comparing *Khalil* to this case, the district court said "the public safety rationale was dramatic and obvious, and the case thus quite distinguishable from the instant matter" (*United States v. Reyes* 2003, 282). The district court continued:

> Unless every suspect in police custody can be interrogated, without Miranda warnings, about what the police might find in a search incident to arrest, the public safety exception can only be applied if the officers have some genuine, particularized reason to believe that conducting the search will be dangerous because of the possible presence of objects whose "undetected presence poses a danger to the police." (*United States v. Reyes* 2003, 282).

The circuit court unanimously overturned the decision of the district court. In beginning their analysis on how to apply *Quarles*, the circuit court states:

> We have had few opportunities to address the public safety exception. See, e.g., United States v. Khalil, 214 F.3d 111, 121-22 (2d Cir. 2000) (affirming admission of defendant's responses to police questioning about a bomb that could have exploded before being disarmed) (*United States v. Reyes* 2003, 152).

The circuit court then cited precedents from other circuits as persuasive precedent, but *Khalil* was the only case from the second circuit that was cited. The circuit court eventually determined that the facts in *Reyes* created "a graphic tableau of danger to both the officers and the public" and allowed the incriminating statements to be used (*United States v. Reyes* 2003, 154).

Khalil was also cited in *United States v. Estrada* (2005) from the Court of Appeals for the Second Circuit involving the execution of an arrest warrant for a suspect known to be involved in the drug trade. The suspect also had convictions for assault and the informant in the case told the police that the suspect kept drugs in his apartment.

During the arrest and while he was being handcuffed, the police asked if there were any guns in the apartment. The defendant said there was a gun in his jacket where the police also found heroin.

The analysis on the application of *Quarles* begins similarly as in *Reyes* with the circuit court noting that it has not had many opportunities to apply *Quarles* and citing *Khalil* as one of the few times. In applying *Khalil*, the *Estrada* court noted that the defense in *Khalil* did not challenge the four questions "prompted by the concern the bombs would explode and how they could be disarmed" and that the only question challenged in *Khalil* involved a question "not of this nature," but that question was allowed to into court (*United States v. Estrada* 2005, 610-611). The *Estrada* court also used *United States v. Reyes* and one other case as precedent from the Second Circuit on the application of *Quarles*. The *Estrada* court determined that the police had "an objectively reasonable need to protect the arresting officers from danger" and allowed the statements to be used in court (*United States v. Estrada* 2005, 613).

As *Khalil* appears to be one of the first cases from the Second Circuit Court of Appeals to apply *Quarles* it is influential. *Reyes* cites *Khalil* as the only instance of horizontal precedent and *Estrada* cites *Khalil* as one of three cases from the same circuit on *Quarles.*[10] The use of *Khalil* in *Estrada* emphasizes the deference to the police noting that all five questions were allowed into court even though the last question was of a different "nature." In all of the cases, the statements made to the police were allowed to be used in court.

[10] The three precedents used in *Estrada* were *United States v. Khalil*, *United States v. Reyes*, and *United States v. Newton* (181 F. Supp. 2d 157). All three are from the Court of Appeals for the Second Circuit and all three allow the questions asked by the police into court under *Quarles*. *Khalil* is the first of the three cases chronologically and appears to be the first Second Circuit case concerning *Quarles* cited in all of the cases.

In both *Estrada* and *Reyes* the area in question appeared to be under the control of the police. In *Quarles*, the public safety exception was created out of a concern that a member of the public or an accomplice might pick up the missing handgun. It would seem unlikely that anyone could enter the apartment during the execution of a search warrant and grab a gun out of a jacket. It similarly seems unlikely that a member of the public or an accomplice could enter a suspect's car to obtain a weapon as in *Reyes*. It should also be noted that unlike *Quarles*, the police had discretion concerning when to conduct the arrests in *Reyes* and *Estrada*. In *Khalil*, the situation was not controlled as the police were racing against time to disarm bombs whose triggers may have been flipped. There is little doubt that the facts of *Khalil* are more serious than in *Reyes* or *Estrada*, and it appears the deference shown to the police in *Khalil* is influential in expanding the application of *Quarles* in the Second Circuit.

Khalil provides an example of how the law can develop where the original exception is expanded upon for a more extreme situation and then applied to more routine situations of criminal conduct. This is not to say that *Reyes* and *Estrada* could not have been decided the same way without the decision in *Khalil*, but it provides an example of how extreme situation can allow for that expansion to occur. There is little doubt that the danger posed in *Khalil* was greater than the danger in either *Reyes* or *Estrada*. The circuit court in *Khalil* spent only 164 words discussing the application of *Quarles* in allowing the statements to be admitted. This short analysis and deference to the police in a difficult situation demonstrates how the law can be applied to very different situations and expand the original ruling. Both *Estrada* and *Reyes* involve common occurrences in the criminal justice system when a suspect is apprehended and taken into custody. The

application of *Khalil* to those cases demonstrates the influence a terrorism case can have on the development of law when applying standards created in an extreme situation to a common criminal procedure situation.

United States v. Abu Ali and Miranda

The decision in *Abu Ali* from the Fourth Circuit Court of Appeals has been cited as precedent concerning the voluntariness of statements and the application of the joint venture doctrine. The defendant was an American citizen who was detained in Saudi Arabia originally as a suspect in bombing in Ryad, Saudi Arabia. He was part of an Al-Qaeda cell that conducted a series of suicide bombing in Riyadh, Saudi Arabi killing 34 people including nine American citizens. Under questioning from Saudi Arabian officials, he admitted that he was being trained to conduct operations inside the United States including an operation to assassinate the President of the United States. This information was shared with the United States government which requested permission to interview the suspect. American officials were allowed to submit questions to Saudi Arabian investigators and view the responses, but not directly ask questions of the suspect. The Saudi Arabian officials limited the questions and only approved six questions submitted by the American officials. The suspect was eventually charged and tried in civilian courts in the United States.

In examining the *Miranda* issues presented in this case the court determined that the statements were admissible. The opinion notes that voluntary statements made while in the custody of foreign officials outside the presence of *Miranda* warnings are generally admissible. The court examined the joint venture doctrine which is in place to prevent

American officials from evading *Miranda* by having foreign officials question suspects in place of officials from the United States government. Even though agents were allowed to submit six questions and view the responses, this did not constitute a joint venture. The voluntariness standard was examined using the totality of the circumstances approach to determine if the suspect's will was overborne. He was convicted and the statements were allowed to be used in court despite allegations of torture and the defendant not having access to an attorney for approximately a year and a half.

Abu Ali has been cited three times concerning the admissibility of statements. In *United States v. Stokes* from the District Court for the Northern District of Illinois in the Seventh Circuit, the suspect was arrested for traveling to Thailand for the purpose of engaging in sexual conduct with a minor (2010). *Abu Ali* was cited in reference to the applicability of *Miranda* stating at first that "[g]enerally, voluntary statements elicited by foreign law enforcement officers in their own nations are admissible in criminal prosecutions in the United States despite any failure by foreign authorities to give Miranda warnings" (*Stokes* 2010, 2). *Abu Ali* is cited several more times to show that because United States officials actively participated in an investigation both *Miranda* and the Exclusionary Rule apply. The court in *Stokes* determined that "U.S. agents were active participants in all facets of the investigation, and that the investigation and surveillance of Stokes took place largely at the behest and under the direction of the United States" so Stokes was provided the same rights as "as a suspect questioned inside the United States" (*Stokes* 2010, 5).

In *Stokes*, the defendant was questioned several times and challenged the responses from each instance. He was questioned during the search of his residence by

Thai and American agents, at a nearby police station by Thai officials and later by American agents at a Thai police station. All of the statements were allowed into court because the defendant was never in custody. While *Abu Ali* is not cited in reference the question of custody the case does emphasize the need for the deterrent effect in creating the joint venture doctrine. The importance of this discussion is that it may allow for statements to be used in court if the government can show there is not deterrent effect in suppressing the statements. While the court in *Stokes* used *Abu Ali* to show that the defendant was afforded the same rights as if he was in the United States, the *Stokes* court ultimately determined that the defendant was not in custody at any point, so *Miranda* did not apply.

The case of *People v. Gomez-Garcia* (2009) from the Court of Appeals of Colorado also cited *Abu Ali* in its decision concerning the statements made by Gomez-Garcia.[11] The suspect was wanted in reference to the shooting of two police officers in Colorado resulting in the death of one officer and the wounding the other. The suspect fled to Mexico and was questioned by the Mexican authorities. The United States involvement included providing the location of the suspect, going to the arrest with the Mexican authorities, and being present while the suspect was questioned. *Abu Ali* is cited in the decision concerning the deterrent effect of applying *Miranda* to questions from foreign officials while the suspect is in their custody. The Colorado court also used *Abu Ali* in the discussion of the whether the joint venture doctrine applied:

> It is not entirely clear how actively American agents must participate in a foreign interrogation in order to trigger the need for Miranda warnings. Compare … with Abu Ali, 528 F.3d at 229-30 n.5 (majority concluded federal agents did not actively participate in overseas interrogation by suggesting questions to their

[11] This case also cites *United States v. Yousef*.

> foreign counterparts). What is clear is that mere presence at an interrogation is insufficient. (*People v. Gomez-Garcia* 2009, 1022).

Abu Ali was used to as demonstrate that a joint venture did not occur. The American agent in *Gomez-Garcia* did not question the suspect, but was only present, although the participation prior to the questioning was greater than in *Abu Ali*. The standard for what constitutes a joint venture is not clear, but limiting the comparison to cooperation during the interrogation and using *Abu Ali* for comparison assists in determining that more than presence is needed.

The third case that cites *Abu Ali* is *United States v. Henley* (2010) from the Fourth Circuit Court of Appeals (the same circuit as *Abu Ali*). In 2006, the suspect participated in robberies at a Wal-Mart store and at a Check Point Check Cashing Store in Maryland. The suspect was questioned by the police six days after being involved in a traffic accident that was the result of a police chase. The suspect agreed to speak with them and signed *Miranda* rights waiver. After the interview, the suspect moved to suppress the statements made to the police. The court cited *Abu Ali* to determine the voluntariness of the statements. *Abu Ali* was cited to use the standard of totality of the circumstances to determine if the defendant's will was overborne and if his capacity for self-determination was critically impaired. In reaching its determination that the suspect's statement was voluntary, the court said:

> Based on the totality of the circumstances of the interview, we conclude that Henley's will was not overborne, and that his statements were voluntary. See Abu Ali, 528 F.3d at 232. The evidence showed that in seeking to elicit information from Henley about the commission of robberies, the officers did not make any promises or otherwise induce Henley to make statements that he did not wish to make freely. See Schneckloth, 412 U.S. at 225; Abu Ali, 528 F.3d at 232. Therefore, we hold that the district court did not err in denying Henley's motion to suppress. (*United States v. Henley* 2010, 375.)

The statements were allowed to be used in court since Henley could not show that his injuries prevented him waiving his rights or speaking freely. The government agents testified that Henley said he was feeling better and that he was not taking the pain medication that had been prescribed to him.

The two cases that cite *Abu Ali* concerning how to apply the joint venture doctrine are both from outside the Fourth Circuit where *Abu Ali* originated. In *Stokes* the court determined that the joint venture did apply, but the suspect was not in custody during any of the questioning, so the statements he made could be used.[12] *Gomez-Garcia* used *Abu Ali* and centered the concept of a joint venture to the questioning of the suspect and not to other areas of cooperation. Compared to *Abu Ali*, the American participation in the questioning was less significant than in *Abu Ali*, although the participation in other areas of the investigation was greater. As was noted in the *Gomez-Garcia* decision, the exact contours of a joint venture has not been defined and it is possible that *Gomez-Garcia* could have been decided the same way without *Abu Ali*; however, *Abu Ali* does provide an example that helps the Colorado court expand the joint venture doctrine. In *Henley*, *Abu Ali* was used to assist the court in determining the voluntariness of a statement and *Miranda* waiver. *Abu Ali* is likely used because it is from the same circuit although the facts of the case are quite different. *Abu Ali* was held in custody without access to an attorney for over a year and the protections of *Miranda* did not apply to his questioning (Said 2010). Using *Abu Ali* to assist in the determination of voluntariness of routine questioning by police officers is an example of how precedents from terrorism cases affect the development of law and expand the power of the government.

[12] There was a question of voluntariness as well because a Thai agent told the suspect that his statements to them would not be given to the Americans. *Abu Ali* was not cited in reference to the voluntariness of his statement which was allowed to be used in court.

Other areas where Terrorism Cases can be Influential

This chapter focuses on the influence of terrorism cases on the development of law dealing with issues related to *Miranda*. There are other areas where terrorism cases are likely to be influential. The need to gather evidence for the prosecution of a criminal case involves both the use of statements made by suspects as well as physical evidence. Often the search for physical evidence involves issues related to the Fourth Amendment. Additionally, many of these cases will involve the use of classified information. Precedents from the use of classified information have been used by both other terrorism cases as well as regular criminal cases concerning drugs, embezzlement, and the attorney-client privilege. The prosecution of terrorism cases will affect the rules of criminal procedure in many areas. Search and seizure law as well as the use of confidential information will be two areas in criminal procedure that will be impacted.

In re Terrorist Bombings and the Fourth Amendment Warrant Requirement

The Fourth Amendment to the United States Constitution provides citizens with protections from government searches and seizures. This amendment provides the basis for when most searches and seizures can be conducted by the government. It states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Notably the Fourth Amendment includes a protection against unreasonable searches and seizures and the requirement that warrants must be based upon probable cause. The

requirement for a warrant stating the probable cause for the specific search is opposed to the idea of a general warrant issued by a sovereign ruler allowing the bearer to conduct any search he feels appropriate (Samaha 2011). Conducting searches outside the United States creates similar problems to *Miranda*. While the search of a home in the United States would require a search warrant magistrates do not have jurisdiction outside the United States nor is it practical to have a magistrate inside the United States sign a warrant for a search outside the country. In *In re Terrorist Bombings* (2008)[13] the discussion of the requirement to abide by the warrant clause when the search occurs outside the United States took place.

Wadih El-Hage is a citizen of the United States who was charged for his participation in the bombings of the American Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. He challenged the search of his residence in Nairobi, Kenya as a violation of the Fourth Amendment's warrant requirement. The Federal Appeals Court for the Second Circuit noted that if the search had occurred inside the United States a warrant would be required. The court then noted that there were numerous exceptions to the warrant requirement of the Fourth Amendment including: exigent circumstances, searches incident to arrest, border searches, administrative searches, consent searches, and inventory searches. Under these circumstances "the probable cause and warrant requirements give way to an evaluation of reasonableness" (*In re Terrorist Bombings* 552 F.3d 157 2008, 169). Searches overseas do not require a warrant, but must comply with the Fourth Amendment reasonableness clause.

[13] 552 F.3d 157 (2d Cir 2008). Note that this is different from the *In re Terrorist Bombings* case cited above (552 F. 3d 177) which dealt with issues of *Miranda*, although it involves the same defendants.

El-Hage was being monitored by intelligence agents from the United States government prior to the bombing in 1998 because of his affiliation with *Al-Qaeda*. The home of El-Hage in Nairobi, Kenya was searched on August 21, 1997 by Kenyan authorities and intelligence agents from the United States government. The warrant authorizing the search of the home was issued by a Kenyan judge for the purpose of searching for stolen property. In introducing the evidence into United States courts, the government does not contend that it was operating pursuant to a valid warrant, but that the warrant clause does not apply to searches of citizens of the United States government when the citizens are outside the United States.

In examining the applicability of the warrant requirement to searches of citizens abroad, the court noted several difficulties. The Second Circuit could not find any precedent and determined "The question of whether a warrant is required for overseas searches of U.S. Citizens has not been decided by the Supreme Court, by our Court, or, as far as we are able to determine, by any of our sister circuits" (*In re Terrorist Bombings* 2008, 168). A search warrant issued by a judge from the United States would have no legal authority overseas. Judges in the United States do not have the authority to issue such warrants and there is nothing in the history of foreign relations that indicates they have been needed or used. Instead, the court ruled that the search should be examined based on the reasonableness of the search using the totality of the circumstances. In *Wyoming v. Houghton*, the Supreme Court stated that the test for reasonableness was done "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests" (1999, 300). The court balanced the need of the United States

government to obtain information on terrorist organization and prevent terrorist attacks with the need of El-Hage to be secure in his residence from government intrusion. The court held that the need to monitor terrorist organizations outweighed El-Hage's privacy interest. It should be noted that the defense request for a suppression hearing was denied because much of the evidence for the search was based on classified information. The trial judge examined the evidence provided by the government, including classified evidence, and announced his ruling rather than have an adversarial hearing.

In re Terrorist Bombings was cited by two cases about the applicability of the warrant requirement to searches of United States citizens by United States officials overseas. In *United States v. Stokes* from the District Court for the Northern District of Illinois in the Seventh Circuit, the defendant challenged the search of his residence in Thailand.[14] Two officials from the United States Immigration and Customs Enforcement (ICE) agency participated with Thai officials in an investigation of Stokes for his involvement in child sex crimes. Stokes' home was searched pursuant to a Thai search warrant that stated the purpose of the search was for evidence of illegal drugs. During the search, an ICE official found a digital camera belonging to Stokes and searched the contents of the camera which showed explicit photos of minors involved in sex acts. Further incriminating evidence was found in a locked safe in Stokes' house.

In re Terrorist Bombings was cited to show that the faulty warrant did not taint the evidence obtained during the search. *Stokes* quotes *In re Terrorist Bombings* stating the "warrant requirement does not govern searches conducted abroad by U.S. agents" and that the search only needs to be reasonable. In balancing the need of the government to

[14] *United States v. Stokes*, 710 F. Supp. 2d 689 (2009). This is the same defendant, but a different ruling from the case involving Stokes that cites *Abu Ali*.

conduct the search, the court noted that the investigation prior to the search of Stokes' home was lengthy and "almost certainly [would have] been sufficient to establish probable cause" (*United States v. Stokes* 2009, 701). Additionally, the balancing also included the way in which the search was conducted which minimized the invasiveness of the search. The authorities waited for Stokes to come home before conducting the search, conducted it during the daylight, and provided him with an inventory of the items taken. This is similar to the facts in *In re Terrorist Bombings* where the wife of the suspect was home, the search was during daylight hours, and an inventory of the items seized was left with the defendant's wife. While the search would have been problematic in the United States since the stated purpose of the search on warrant was for illegal drugs not evidence of illegal sexual conduct, the reasonableness standard allowed the evidence to be used in court.

United States v. Defreitas (2010) from the District Court for the Eastern District of New York in the Second Circuit also cites *In re Terrorist Bombings* concerning the search of a United States citizen abroad by agents of the United States government. This case involves the arrest of United States citizens and non-citizens who were planning to attack the John F. Kennedy International Airport by exploding fuel storage tanks. The suspect, a naturalized United States citizen, challenged the search of his residence in Georgetown, Guyana, because the warrant used for the search was defective. The warrant in question was from the Guyanese government and while it stated there were reasons to believe the premises contained firearms, ammunition, and explosives, it never explained the basis for those reasons.

In re Terrorist Bombings is cited to show that the search of Defreitas' residence only needs to be reasonable and that no warrant was needed. The court cites *In re Terrorist Bombings* in making its reasonableness analysis weighing the "limited intrusion" against "the government's manifest need to investigate possible threats to national security" (*United States v. Defreitas* 2010, 306). The court concludes "there can be no doubt that the balance of the relevant factors weights in favor of a finding of reasonableness here" (*United States v. Defreitas* 2010, 306). Again, the search warrant would likely have been suppressed in the United States as it did not contain any explanation of probable cause, but the search was permissible under the reasonableness standard.

In re Terrorist Bombings creates another exception to the warrant requirement of the Fourth Amendment.[15] The ruling's exception appears to be well founded both practically and legally as the searches take place outside the territory and authority of the United States. All three cases involve the attempted use of a search warrant that would fail if they had been used in a domestic criminal case inside the United States. The warrant in *In re Terrorist Bombings* was for stolen property rather than evidence related to the embassy bombing, the warrant in *Stokes* was for narcotics rather than evidence related to child sex crimes, and the warrant in *Defreitas* did not contain any explanation of the reasons to believe evidence would be found in the suspect's residence. Despite the flaws in the search warrants, the courts ruled that the warrants are not needed, although all of the cases agree that the Fourth Amendment reasonableness clause does apply to United States citizens when searched by Untied States officials overseas. The need and

[15] There are many exceptions to the Fourth Amendment warrant requirement including searches incident to arrest, border searches, consent searches, exigent circumstances, and open fields among others.

interest of the United States government to conduct the searches was great in all three cases. Two of the cases involve acts or potential acts of terrorism while the third involved an active pedophile. The balancing test in all three cases favors the government. While the specific incidents in which this exception to the warrant requirement would be used are likely limited, the creation of new fact patterns entering the court system and being applied can be seen through *In re Terrorist Bombings* and the cases that cite it.

Conclusion

The terrorism cases listed and the cases in which they were used provide evidence that these cases will have an impact on the development of law in common criminal justice cases. First, in all of the parent cases listed, the government prevailed on the important issues. While these are only five cases, there are only a few terrorism cases that have been decided at the federal court of appeals level on a criminal procedure issue. In addition to the five parent cases discussed, the government also prevailed in sixteen of the seventeen cases that used the terrorism cases as precedent. The only case the government lost was *Karake* where the defendants were held in deplorable conditions and beaten prior to interviews with the FBI. The government won in cases where suspects specifically requested an attorney, where suspects were held incommunicado for extended periods of time, where the danger to the police and the public was controlled by the government, and in cases where the warrants that were used were obviously deficient. This research is not attempting to make a normative argument that the cases should have been decided differently, but that the importance of the precedence and the need for the government to prevail in those cases creates precedents that influence subsequent cases.

An important point to note concerning the influence of the parent terrorism cases, is the influence they have due to the unique circumstances. *Yousef* was seven times related to *Miranda* issues and only one of those was inside the Second Circuit where the decision was established. The other cases cited *Yousef* due to a lack of precedent in the area of applying *Miranda* to the questioning of suspects by foreign agents. While there were cases prior to *Yousef, Yousef* has established a clear doctrine for others to follow that *Miranda* as a general rule does not apply. Similarly, *Khalil* was cited inside its own circuit due to a lack of cases on the public safety exception. In the second *In re Terrorist Bombings* decision examining the application of the Fourth Amendment to cases outside the United States, the court said that it could not find any other precedent on this issue. The likely increase of global crime will provide more instances for the terrorism cases that have already been decided to become precedent for future criminal justice cases.

Another trend that is apparent is where precedents have influence. When precedents are cited by cases outside their circuit, they are more likely to be serious cases involving important issues. *Yousef* was cited outside its circuit for four murder cases and two terrorism cases. It was cited inside its circuit for a drug case, although it was a major international drug case. The first *In re Terrorist Bombings* case was cited outside of its circuit for two murder cases. It was cited inside its circuit for a routine drugs and weapons possession case. *Khalil* was cited inside its circuit for routine drugs and weapons cases. *Abu Ali* was cited outside of its circuit for a murder case and an international child sex case. It was cited inside its circuit for a routine robbery case. In each of these examples, the routine cases that cite the terrorism case as precedent are from the same circuit. The more serious cases that cite the terrorism precedent are from

outside the circuit. While this is likely due to the courts looking for precedent in important cases to carefully make a decision, it also explains where and why routine cases are likely to be influence by terrorism prosecutions. Cases from the same circuit are more likely to apply terrorism precedent to routine criminal justice cases. It follows that circuits with the most terrorism prosecutions are likely to be impacted the most. From the cases listed, the Second Circuit is likely to be impacted more than the other circuits.

The courts, judges, attorneys, jurors, and other members of the legal system are not separate from society. The law is influenced by events in society as they make their way into the court system. Precedents from terrorism cases are likely to influence other aspects of the criminal justice system as they are used to decide both terrorism and non-terrorism cases. This chapter has focused on the challenges of *Miranda* and how decisions related to these unique cases can influence the development of the law. There are other issue areas such as search and seizure and sensitive information that may also provide some areas of influence. The idea that more serious cases can influence the development of the law has been considered before. In 1949 Justice Jackson explained the development of search and seizure law:

> [I]f we are to make judicial exceptions to the Fourth Amendment . . . , it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger. (*Brinegar v. United States* 1949, 183).

The increased concern about terrorism creates many changes in our society. There are more government resources devoted to keeping our country safe. As the concern over terrorism manifests itself into the increase in the prosecution of terrorism cases it is important to understand how this will affect the development of law in other areas as well. It is likely that the government will prevail in many of the cases and create precedent that will be used in non-terrorism cases. This will pull the judiciary in a direction away from liberty and toward security.

CHAPTER 3

REVIEW OF THE LITERATURE

Concern over terrorism is increasing the number of criminal prosecutions for terrorism related charges. The litigation from appeals in these cases establishes precedent and the subsequent precedent affects the development of law in criminal procedure. Chapter 2 of this research showed how precedents from *Miranda* cases from terrorism prosecutions affect the development of legal doctrine. By systematically examining trends across a larger set of observations, one can determine whether it is appropriate to draw generalizations from the doctrinal developments noted in Chapter 2. This chapter reviews existing scholarship relevant to that inquiry. Previous research in judicial politics demonstrates that precedents are important in the development of the law and that security issues can influence the decisions of judges (Cross et al. 2010; Hansford and Spriggs 2006; R. Posner 2006a).

The emphasis on scholarship as it pertains to the courts has been influenced by studies of judicial behavior. In particular, the "near-hegemonic status of the attitudinal model" has placed the emphasis of judicial scholarship on the votes of justices of the Supreme Court (Hansford and Spriggs 2006, 4). Social scientists are encouraged to focus and study what judges do rather than what they say (Spaeth 1965, 879). There is a great deal of research that indicates the personal policy preferences of judges have an impact on Supreme Court decision making (Brenner and Spaeth 1995; Schubert 1965; Segal and Spaeth 2002) as well as in lower courts (Epstein et al. 2008; Hettinger, Lindquist, and

Martinek 2007). While it is important to acknowledge the influence of policy preferences, legal factors, including precedents, have also been found to influence judicial decision making (Cross 2007; Cross et al. 2010; Gerhardt 2008; Hansford and Spriggs 2006; Richards and Kritzer 2002). As precedents are established, interpreted, and applied, they affect the development of the law. The precedents that help to shape the law can be influenced by the nature of the cases in the judiciary such as those involving security concerns over terrorism.

If scholars are encouraged to study what judges do, studying the use of precedent is important because judges are more likely to refer to precedent as the legal authority for a decision than any other type of legal authority (Cross et al. 2010). Judges look to the previous decisions of their own court, the decisions of judges in other courts, and to the authority of the US Supreme Court when explaining the reasons for a holding in a case. Judges are trained to use precedent in making a legal decision and it is the currency of the judicial system in the United States. While precedents are commonly used, they are understudied: "perhaps the most important, yet understudied, area of legal research involves precedent" (Lindquist and Cross 2005, 1157).

Since this study concerns the development of law in criminal procedure cases, it is important to define some key terms. *Stare decisis* and precedent are important concepts that form the basis of our legal system and many of the inquiries of judicial social scientists. *Stare Decisis* means to "adhere to precedents, and not to unsettle things which are established" (Brenner and Spaeth 1995, 1) while precedents are the analogous cases used as examples to assist judges in creating a decision. Vertical *stare decisis* refers to the obligation of lower courts to follow the precedent of higher courts in the same

jurisdiction while horizontal *stare decisis* refers to the duty of a court to conform to its own precedent or that of an equal court in the same jurisdiction (Brenner and Spaeth 1995). Judges create rules using past decisions as analogies to assist in the decision making process. The norm of *stare decisis* requires that courts follow previous decisions, although this does not mean that "a point of law once settled is permanently settled" (Mattis 1990, 267).

Precedents can be cited by courts in their same circuit and by courts outside their circuit. If the precedent is from a higher court in the same circuit (vertical) or from its own court (horizontal), the precedent is binding and should be followed. Precedents that are from another parallel court are considered persuasive and can be followed at the discretion of the court. There is no accepted theory of when and why courts use or follow precedent, either binding or persuasive (Cross et al. 2010; Hansford and Spriggs 2006). Additional scholarship on the use and impact of precedent is needed because "the literature continues to present an underdeveloped theoretical and empirical understanding of why and when law changes" (Hansford and Spriggs 2006, 4).

Adherence to *stare decisis* is a core structural feature of the common law system and important to its functioning (Alexander 1989). A key aspect of precedent is that it allows judges to extract the legal principles that are used to guide future decisions and thus create doctrine that guides judicial decision making and creates coherence in the law (Maltz 1987). Justice Louis Brandeis felt stability and predictability were more important than a judicially correct outcome stating "in most matters it is more important that the applicable rule of law be settled than that it be settle right" (*Burnet v. Coronado Oil & Gas* 1932, 406). Predictability in law is important to society because it allows

members of society to plan their actions with an understanding of what is legal and what is not. It also provides fairness as litigants in similar situations are treated in the same manner.

Much of the scholarship on courts began in the early part of the century with Karl Llewellyn and Roscoe Pound who promoted the ideas of legal realism (Duxbury 1995, 65–159). The legal realists were influenced by Oliver Wendell Holmes and his beliefs that "[t]he law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics" (Holmes 1993, 9). Legal realism incorporated a wide variety of ideas with the basic concept that there are other forces acting on the law other than formal rules and laws. Llewellyn described the legal realist position as "[t]o know law, then, to know anything of what is necessary to judge or evaluate law, we must proceed into these areas which have traditionally been conceived (save by the historical school) as not-law" (Llewellyn 1993, 74). The concept that forces outside the law itself influence how the law is shaped and the rulings of the courts forms the basis of much of the current judicial scholarship. Much of the current research on judicial politics including this research begins with the idea that forces outside the law can influence legal decisions.

The policy preference of a judge may conflict with a legal precedent on how a case should be decided. Judge Jerome Frank noted that "*Stare decisis* has no bite when it means merely that a court adheres to a precedent it considers correct. It is significant only when a court feels constrained to stick to a former ruling although the Court has come to regard it as unwise or unjust" (*United States v. Shaughnessy* 1955, 719). Segal and Spaeth looked at the influence of a precedent compared to the policy preference of a

judge. They argued that if *stare decisis* is influential, a binding precedent will cause a judge to act in a manner opposite of the personal preference of the judge. It is impossible to determine if a precedent has value if it falls in line with the policy preference of a judge since the judge would vote in the same direction absent a controlling precedent. They theorized that if precedent is to have value it has to influence the decision of a justice when that decision is in opposition to the policy preference of the justice. To test this argument, they examined the progeny of Supreme Court decisions to determine if justices who dissented from the original opinion followed the precedent when later faced with a similar case. They found that justices only followed precedent 12 percent of the time (Spaeth 1999, 309). In contrast, they found that the attitudinal model predicted 85 percent of the justices' votes during the same time period (Spaeth 1979, 122–123, 154–164). In another study by Segal and Speath, the attitudinal model correctly predicted the majority and dissenting coalitions in 19 of 23 death penalty cases (1993) . When Segal and Spaeth looked at the votes of Supreme Court justices in civil liberties cases between 1953 and 1999, they were able to predict the votes of the justices based on their ideology 76 percent of the time (2002, 322–323).[16] These studies emphasized the importance of personal policy preference in predicting judges' decisions.

One problem with the attitudinal theory of decision making is explaining the reason why judges write judicial opinions explaining the legal basis for their decision if the decision is based on personal policy preference rather than a legal foundation. The most often answer given by proponents of the attitudinal model is that decisions must appear to be based in law if they are to be seen as legitimate and obeyed. According to

[16]It is important to note there are criticisms of the attitudinal model of Segal and Spaeth. These criticisms include that Segal and Spaeth did not include summary dispositions in their analysis, that there are coding errors, and that progeny from previous Supreme Court cases rarely address the exact same issue.

this theory, courts believe that "unless its outcomes are viewed as principled, and not simply as the result of changes in Court personnel, its decisions will be viewed with skepticism by the public and will lose much of their obligatory force" (Tyler and Mitchell 1994, 708). The concept of legitimacy is important to the courts because "legitimacy is deemed necessary to the voluntary acceptance of Court decisions, voluntary acceptance being the only type of public acceptance of the decision on which the Court formally can rely" (Tyler and Mitchell 1994, 708). This theory posits that judges "first arrive at their desired conclusion and only then develop a legal rationale" while the legal reasoning "merely serves as a post hoc justification of their decision" and "a cloak for the justices' policy decisions" (Wahlbeck 1997, 780).

Other studies have also found precedents to have a greater impact on judicial decision making than suggested by proponents of the attitudinal model. One study of voting by newly appointed justices vote in landmark decisions indicates that justices voted according to precedent almost 60 percent of the time (Merola 2004, 18). Another study found adherence to *stare decisis* varied among the justices. Justice Black and Douglas "showed relatively little devotion to precedents but the Warren Court more generally was concerned about *stare decisis*" (Cross et al. 2010, 489).

Another indication that precedent is not a mask for the policy preferences of judges is the use of precedents in non-published material. Epstein and Knight looked at the use of precedent in different areas including during the conference discussions among justices on the Supreme Court (1996). They found that justices cite precedent the vast majority of the time when discussing a case with other justices. If precedents were a

mask, there would be little reason to refer to precedent with other justices in non-published and private discussions with other justices.

Richards and Kritzer theorized that precedents can create new rules such as "a new standard of review or balancing test" (2005, 34). They look at the cases before and after a regime is created to determine if that regime influences the decisions of the Supreme Court. They suggest that the development of law is influenced by the institutional rules created by the actors (judges) in the system. In each analysis they found that the regime created by the precedent influenced the subsequent decisions of the Supreme Court. Their research indicates that precedent can have an influence on the development of law.

While scholars often pit attitudinal explanations against legal models, there can be little doubt that both play a role in the development of law (Friedman 2006). Judges are not separate from society living in isolated areas where they are only exposed to a sterile view of the law with no outside influences. Judges are also members of a legal tradition where they are bound by previous judicial decisions and by judges from higher courts. Studying the development of law by examining how precedents are used allows us to view how both of these influences shape the final product of law.

Influence of Precedent in Lower Courts

Professor Segal, a strong proponent of the attitudinal model, notes that "institutions, though, matter, as lower court judges are not as free to engage in attitudinal behavior as supreme court justices are" (2011, 28). He explains that "an extensive literature demonstrates the influence of law and hierarchical authority on the decisions of

lower court judges" (Segal 2011, 28). The theories as to why a Supreme Court justice may feel free to follow his or her policy preference assumes that the justice does not seek a higher office and is not concerned about being reversed since the Supreme Court is the highest judicial body. A federal circuit or district judge may desire to move to a higher level and may also be concerned about being reversed. In addition, the nature of the mandatory docket for lower federal courts yields a higher number of routine cases. For these reasons, one would expect that the influence of personal policy preferences would be reduced in levels below the Supreme Court.

Several studies found support for the idea that lower courts follow the precedents and policies of the Supreme Court. A study of defamation rules following the Supreme Court decision in *New York Times v. Sullivan* showed that federal circuit and district courts "complied with the Court's rules consistently" (Gruhl 1980, 517). A subsequent study "confirmed Gruhl's findings on compliance and added that the Supreme Court's libel decisions had a significant effect on the decisional trends of the courts of appeals" noting that there is a difference between complying with the precedents of the Supreme Court and the policies of the Court (Songer and Sheehan 1990, 313). Another test of compliance with the changing search and seizure decisions of the Supreme Court found that the courts of appeals are highly responsive to the policies of the Supreme Court, although judges were able to promote their own policy preferences in ambiguous situations (Songer, Segal, and Cameron 1994). Other studies in the areas of religious freedom and obscenity also found federal courts to be responsive to the judicial opinions of the Supreme Court (Brent 1999; Songer and Haire 1992). There is a great deal of

research showing compliance among federal circuit courts with decisions of the Supreme Court.

In one leading study of circuit court judicial decision making, Frank Cross (2003) tested the legal model by looking at the deference to appeals from district court trial decisions. He theorized that circuit courts will show the most deference to appeals of trial decisions compared to summary judgments and j.n.o.v. decisions.[17] This theory is based on the idea that trial court appeals are based on findings of fact. Cross indeed found that circuit courts affirm trial court decisions at a higher rate than other appeals to the circuit court (Cross 2003, 1501). This supports the legal model because the legal model requires circuit court judges to defer to the findings of fact by lower courts even if they disagree with the decision (Cross 2003, 1500). He also tested for ideological influence by examining the effect of the ideological make-up of a circuit court panel on the likelihood that the panel will reverse a liberal decision of a lower court. His research indicates that even a conservative circuit court panel is more likely to affirm a liberal decision from the district court than it is to reverse the decision. Cross concludes that the "traditional legal model clearly explains a significant part of this decisions making, even after controlling for ideology and other variables" (Cross 2003, 1514). In testing the models, he does not claim that personal policy preferences do not have influence, but that "the law may moderate the effects of political leaning in some cases or supplant them entirely in others" (Cross 2003, 1514).

Other research indicates that courts of appeals show a great deal of deference to their own opinions and adhere to *stare decisis* more than the Supreme Court (Lee 2003;

[17] J.n.o.v. stands for judgment not withstanding a verdict. It occurs when a judge overturns the verdict of a jury.

Mead 2011). Mead looked at both circuit and district courts and noted that *stare decisis* promotes "predictability, fairness, appearance of justice and efficiency" (2011, 9). He further states that "the law of the circuit is still quite good – far more rigid than the horizontal *stare decisis* practices of the Supreme Court" (2011, 16). Lee examined decisions of the United States Court of Appeals for the Sixth Circuit finding that panels on the Sixth Circuit followed their own precedent over 80 percent of the time. He further found that the ideological composition of the circuit panels did not explain negative treatment of precedent although it was useful in determining the ideological direction of the panel vote.

Precedent is also important at the federal district court level. Baum found that precedents form the federal circuit courts "exert real influence over the decisions of their subordinates" due to the ability of the circuit court to reverse a decision of the district court (Baum 1980, 223). A more recent study found that precedents were influential in the outcome of district court decisions although their use was motivated to show the potential for promotion (Morriss, Heise, and Sisk 2005). Another study examined the responsiveness of district court judges to the anticipated rulings of the circuit court finding that "District court judges are significantly constrained by anticipated responses from the courts of appeals" (Randazzo 2008, 685). District courts appear to be responsive to the decisions of the appeals courts in their circuit. The hierarchical structure of the court system encourages district courts to be responsive to the decisions of circuit courts that has the authority to review (and reverse) their rulings.

A more direct approach to evaluate the influence of precedent has been to ask judges if they find it important. David Klein and J. Woodford Howard both conducted

surveys of circuit court judges. Howard reported that circuit court judges generally "felt obliged to obey the Supreme Court" (Howard 1981, 156). Klein found that judges were concerned about precedent, but that they had numerous opportunities to create law unfettered from Supreme Court precedents (2002, 134–135). According to Klein, "much of the federal law in any circuit looks as it does because court of appeals judges think it should look that way." Overall, the research suggests that precedents will be influential in the decisions of federal district and circuit courts.

Why and When is Precedent Used

There is no accepted theory of why and when judges use precedent (Gerhardt 2008; Lindquist and Cross 2005). Judges can use precedent in several different ways. A judge may simply list the case along with other related precedents, without elaborating on the relevance of the precedential case. This is referred to as citing the case or listing it in a string citation when it is a part of a list of cases that have ruled on a similar issue. A judge can also demonstrate that s/he relies on a case as judicial authority to guide the outcome of the current case under consideration. When a case is relied on as precedent there is usually some discussion, even if very brief, explaining the relevance of the precedential case to the current case under consideration. There have been several recent studies on citation practices (Cross et al. 2010; Landes, Lessig, and Solimine 1998; R. Posner 2000; Walsh 1997).

Several theories exist as to the reasons why judges cite precedent. First, judges may cite precedent out of a good faith attempt to determine the correct legal result in a case. Second, the use of precedent saves time and decreases the work of judge who

simply follows the legal research that has already been conducted. Third, judges are socialized into a system where legal precedent is important and that legal decisions are made by adhering to precedent. Precedents help to increase the legitimacy of the judiciary by explaining the legal basis of their decision rather than basing their decision on person choice (Lindquist 2011). Judges rely on the legitimacy of the legal institution for the enforcement of their decisions as judges do not have the ability to ensure society abides by their rulings. The American public expects that judicial decisions are based on legal reasoning and not the personal desires of judges (Hansford and Spriggs 2006, 20). While there is no agreement on a social science theory explaining or predicting precedent use, there are many theories as to why precedent is valued.

Cross and Lindquist examined why and when precedents were used (Lindquist and Cross 2005). They looked at cases of first impression where judges clearly stated there was no controlling precedent and cases where precedents had been established. They found that judges were free to decide cases based on their ideological preferences when there was no prior controlling precedent. The second part of their study looked at the gradual evolution of precedent in interpreting the phrase "under color of law." The results of their study suggested that precedent is initially stable or increasing over time; however, as the number of prior decisions grows, precedent becomes less important and ideology again increases in importance.[18] The findings of this research suggest that the influence of precedent can change over time as the amount of precedent available for use changes.

[18] They created a logistic regression model with ideology as one of the dependent variables. To test for the effect of ideology over time, they divided up the cases into three time periods and included the time periods as a variable in the model (time period one was not represented since it was used as the base for comparison). The variable for ideology multiplied by the time variable was significant for the other two time periods.

Hansford and Spriggs conducted influential research on the use of Supreme Court precedent (Hansford and Spriggs 2006). They theorize that there are two important factors influencing how a judge treats a precedent. Judges seek to move precedents in a direction that promotes a preferred policy choice as well as increase the legitimacy of the Court. Since judges do not enforce opinions, they rely on the legitimacy of the court to see that their opinions are adhered to by the public. For this reason, judges cannot ignore precedents that they do not agree with or that do not conform to their policy preferences. In determining whether to treat a precedent positively, judges must weigh the utility between promoting their policy preference and promoting the legitimacy of the judiciary.

According to Hansford and Spriggs, an important variable in determining how a precedent is treated is the vitality of the precedent. Vitality refers to the legal authority or legal weight of that precedent. Some precedents are seen as having greater legal authority than others making it difficult to treat them negatively. Some factors that influence the legal authority of a precedent include the size of the decision coalition, the presence of a separate opinion, and the age of the precedent (Hansford and Spriggs 2006, 23). Their research indicates that the treatment of a precedent by a citing court is influenced by a combination of the ideological closeness of a precedent and its vitality. Hansford and Spriggs found that precedent vitality was important in determining the number of times lower courts cite or positive treat a precedent from the Supreme Court.

There are other indications of the vitality of a precedent. The presence of opinions other than the majority opinion can cast doubt on the legal holding of the case (Aldisert 1989; Johnson 1987). Benesh and Reddick looked at the influences of precedent on the federal courts of appeals when the Supreme Court overturned a previous

precedent (Benesh and Reddick 2002). They found that the unanimity of a precedent, the complexity of the precedent, and its age affected the treatment from the circuit courts. Interestingly, they found that the ideological consistency between the lower court and the Supreme Court was not significant in determining the treatment by the lower court.

A decision on what court to cite and what precedent to follow is a complex decision as judges are free to cite any legal authority including persuasive precedent from outside the court circuit or binding precedent from a superior court. A recent examination of citation practices on the Supreme Court found that concern over the legitimacy of a ruling increases citation rates, but that decisions on what to cite vary by justice (Cross et al. 2010). Calderia looked at the use of precedent in state supreme courts finding that state courts cite other state courts that are geographically close and courts that are confronted with similar problems (Caldeira 1983). Lower court judges will look at rulings used by other lower court judges and use precedents that were successful rather than craft entirely new solutions to a similar problem (Haire 2008, 513). Lower court judges may also cite a similar case decided by another lower court to avoid being an outlier (Klein 2002). Precedents are created from cases that come before the courts and as society changes new fact patterns emerge creating new controversies and new precedents. Rarely is a new case "on all fours" with a prior case (Lindquist and Cross 2005, 1163). This allows for the development of the law as judges apply precedent from previous cases to new ones.

The presence of the government in a case can influence the judiciary. At the level of the Supreme Court, when the government is the petitioner this can act as a signal that a case needs to be reviewed (Caldeira and Wright 1988). The government is thought to be

successful in the judiciary because it has an advantage as a repeat player which allows the government to identify which cases are more likely to be successful on appeal and what arguments are likely to be persuasive (Galanter 1974, 1975; Kritzer 2003). The government also has an advantage because the judiciary is a part of the government which creates the rules for the entire system and enforces the decisions of the judiciary (Kritzer 2003, 343). Songer and Sheehan applied this framework to the circuit courts of appeals finding that the litigant with the most resources tends to prevail (1992). A later study by some of the same authors showed that the "haves," especially the government, had an impressive winning record in sixty-four years of analysis on the circuit courts of appeals (Songer, Sheehan, and Haire 1999). The success of the government and other well-resourced litigants was also noted in state courts (Brace and Hall 2001; Farole 1999).

Terrorism Cases Will Create New Precedents

The nature of anti-terrorism cases is different from ordinary criminal cases. The effort of the law in the past has been "deterrence and retribution" (Stevenson 2011, 140). Laws aimed at ordinary crime focused on the threat of punishment as a deterrent to committing the crime. Criminals were charged after the crime was completed. Terrorism cases are aimed at prevention rather than deterrence. To prevent terrorism, efforts are aimed at "raising the investment costs for criminals" making it more difficult to complete the crime (Stevenson 2011, 140). In addition, the laws often target crimes where the person either knew or should have known their actions were a crime such as laws criminalizing support for terrorist organizations. As terrorists are prosecuted for these

crimes, the prosecutions will create "binding precedents for non-terrorism cases that use identical phrasing" (Stevenson 2011, 151). The need to prevent terrorism incidents before they occur is different from other types of crime which will influence criminal procedure law.

Some studies indicate that the desire to prosecute terrorism cases is already having an effect on the judiciary. Ryan Williams examined recent Supreme Court decisions on *Miranda* and compared them to the attempted acts of terrorism in the United States. He uses comments from government officials on the need for more flexibility in questioning terrorist suspects to draw a correlation between the decisions on *Miranda* and the impact of acts of terrorism (Williams 2010). Williams posits that United States Supreme Court cases *Florida v. Powell, Maryland v. Shatzer*, and *Berghuis v. Thompkins* were influenced by the attempt to blow up a plane over Detroit, Michigan in 2009 and the attempted Times Square bombing in 2010.[19] The net effect of these decisions increased the authority of the government when questioning criminal suspects and increased the ability of the government to admit statements into court. Williams determined that the attempted terrorists incidents combined with statements from public officials influenced the decisions of the Supreme Court. He determined that the Supreme Court was responding to the perception that the government needed to more easily question terrorist suspects.

[19] *Florida v. Powell* concerns allowing the government to use any language that conveys the *Miranda* warnings rather than having to use specific language. *Maryland v. Shatzer* ruled that a request for an attorney is not an indefinite request and that entry into prison is a sufficient break to allow a suspect to be re-questioned. *Berghuis v. Thompkins* allowed the government to infer from the suspects actions that *Miranda* rights were wavied even though the defendant refused to sign a waiver form.

The influence of terrorism can be seen in the penalties given to suspects convicted of a terrorist crime (Bradley-Engen, Damphousse, and Smith 2009). They found that the average sentence for a terrorist suspect was over twice as long as the average sentence for a similarly situated non-terrorist. Additionally, they found that terrorist suspects were more likely to receive jail time and were more likely to be convicted in a trial rather than a plea bargain. The findings of this study indicate the judiciary is concerned about terrorism and this concern has an influence on the actions of the judiciary.

While there is substantial anecdotal evidence on the behavior of the judiciary during times of crisis, few studies have attempted to empirically test the theories. Epstein et al. used a matching methodology to compare cases from different periods of crisis in the United States. Generally, they found that the Supreme Court is more likely to suppress rights during times of war than during times of peace. While their study was inspired by the events of September 11, 2001 most of their data was from periods of time prior to attack. Epstein et al. predict "that as long as the war on terror continues in a severity comparable to previous wars, we should see a sharp turn to the right in ordinary civil rights and liberties decisions…" (Epstein et al. 2005, 95).

Cass Sunstein also examined the impact of national security issues on the federal circuit courts of appeals (Sunstein 2008a, 2008b). To conduct his study he searched for cases from the federal circuit courts of appeals dealing with an issue of national security between September 111, 2001 and September 10, 2008. He finds that courts tend to favor the government when ruling on cases involving national security, voting in favor of the government 85 percent of the time. He also finds that the votes of judges vary depending upon whether they were appointed by a Democratic or Republican president

with Republican appointees more likely to side with the government than Democratic appointees. The pattern of voting in favor of the government did not decrease over time with the rates the first three years after September 11, 2001 being similar to the rates toward the end of his study. Courts ruled in favor of the government in national security issues more frequently than they do for general criminal cases. Sunstein's findings show that government wins approximately 66 percent of the time in criminal cases compared to the 85 percent in national security issues. While the study indicates a high rate of deference to the government, he points out it does not provide a "blank check" to the government to take any action it desires (Sunstein 2008a, 18). Sunstein's research indicates that the government prevails on issues of national security almost 90 percent of the time.

The study of precedents by the courts is important in understanding the development of law in the American judicial system. There is no accepted theory about where and when precedents are used. Research shows that lower courts follow binding precedents, but that other factors outside such as ideology, the vitality, and the age of a precedent also influence their use. Research on persuasive precedent indicates that judges cite non-binding precedents from courts that are similarly situated or contemplating a similar issue. Terrorism cases will be of greater concern to courts than ordinary criminal cases and are treated differently than ordinary criminal cases. As precedents from terrorism prosecutions are created, they will be used and influence criminal procedure law. This influence will not be limited to trials of terrorism suspects, but will include common criminal cases and the rights of American citizens charged with criminal offenses. Understanding where and how precedents from terrorism cases will be

influential will assist in understanding the development of law. It will also be useful to compare the use of precedents from terrorism cases to other types of crimes such as drug crimes. The impact of precedent from terrorism prosecutions also has public policy implications concerning the trying of terrorism suspects in domestic criminal courts.

CHAPTER 4

METHODOLOGY

The prosecution of terrorism cases will generate appeals and, for some appeals, the disposition of the upper court will yield a far-reaching precedent. Over time precedents in these cases would be expected to influence legal issues raised in terrorism cases. Yet, the influence of these precedents may extend to other areas as rulings from these extraordinary fact patterns are then applied to more common criminal procedure cases. For example, in *United States v. Khalil* (2000) judges allowed for more flexibility to law enforcement when given a doomsday scenario where police acted to defuse a suspected bomb. Precedent from this extraordinary fact pattern was then applied to more common criminal procedure cases when the public safety exception in *Khalil* was used by a later court when examining a "common" arrest situation in *United States v. Reyes* (2003). Chapter 2 presented examples that illustrate how precedents from terrorism decisions influenced the law of confessions. It is important to determine if this reflects a broader trend: are precedents from terrorism cases exerting an influence in criminal procedure law in general? This chapter will explain the methods used in the quantitative analysis of this research.

As noted earlier, several scholars have theorized about the relationship between security concerns and judicial deference to other branches of government during times of crisis. One study conducted shortly after the September 11, 2001 attack examined search and seizure cases concluded that terrorism cases were likely to influence criminal

procedure case law because courts are likely to defer to other branches of government on security issues (Stuntz 2001). Likewise, other scholars believe that the courts will defer more to other branches of government on questions of national security and terrorism (E. Posner and Vermeule 2007; R. Posner 2006a). Several scholars have contemplated the suitability of the criminal justice system for use in prosecuting terrorism compared to military tribunals (Chesney 2008; LaFree and Hendrickson 2007; Vladeck 2010). Some scholars theorized that the potential effects of terrorism cases would be similar to those of drug cases with the evolution of the war on drugs in the 1980s (Weisselberg 2008). While these studies have theorized about the possible changes, few studies have attempted to empirically examine the impact of terrorism cases or national security issues on the judiciary. One exception is a study that examined the history of the judiciary in wartime to gain an understanding of how the courts operate during crisis (Epstein et al. 2005) . A second study examined the success of the government in national security cases after September 11, 2001 (Sunstein 2008b). While there has been a great deal written and discussed about the judiciary's response to security issues in general and to terrorism cases specifically, additional empirical research is needed.

To study the impact of the terrorism prosecutions on the development of case law, this analysis begins with the precedents generated in federal appellate courts as a result of the prosecution of terror suspects. Research demonstrates that lower courts are responsive to the precedents of superior courts (Caminker 1994; Cross 2003; Lee 2005; Mead 2011). Other studies examine citation patterns of non-binding precedents finding that courts cite other courts with similar characteristics and that citations increase when the issue salience increases (Caldeira 1983; Cross et al. 2010; Glick 1992). Adapting the

methods used in prior research will permit an examination of terrorism cases both for their content and to see where they are used. Chapter 2 traced the use of precedents from terrorism prosecutions to show what impact they have on criminal procedure law. A quantitative analysis of precedents from terrorism cases will look at their impact more broadly.

Case law is created incrementally, with judges building on previous decisions of the courts. The judicial system in the United States is built on the idea that judges "adhere to precedents, and not to unsettle things that are established" (Brenner and Spaeth 1995, 1). Precedents are the legal rules from previous court cases that determine which case facts are important (Hansford and Spriggs 2006; Richards and Kritzer 2002). *Stare decisis* involves reasoning by example where comparisons are made between the facts in the instance case to fact patterns in previous cases and, if found to be similar, applying the holding from the previous case. (Hansford and Spriggs 2006). Precedents "provide guidance for the future" with "the knowledge that a decision will function as a precedent" (Farber and Sherry 2009, 71). Justice Lewis Powell commented that "restraint in decision making and respect for decisions once made are the keys to perseveration of an independent judiciary and public respect for the judiciary's role as a guardian of rights" (Powell 1990, 289–290).

As part of the reasoning process and in writing legal opinions, judges cite precedents. With each new case, another precedent is established building on previous decisions. The gradual development of the law occurs when cases are heard by higher courts and precedents are created which are intended to guide the decisions of subsequent

courts examining the same or similar issues. Hansford and Spriggs summarize the role of precedents as:

> The core purpose of precedent in this process is to provide judges with information about how to compare and group factual circumstances so that they can be treated similarly. In the process of determining these legal rules, judges decide specific disputes, and, in so doing, affect the meaning and reach of precedents. (Hansford and Spriggs 2006, 19).

The process of analogical reasoning is not automatic. In the search for precedents, judges have discretion to draw on previous decisions with similar elements. Precedents rarely provide an identical fact pattern to the case under consideration. "No case is exactly identical to prior cases, conclusively governed by particular past opinions" (Cross et al. 2010, 490). Precedents provide an "incomplete constraint" because judges "reach different conclusions about the correct disposition of a particular case, even though the precedents they consider are identical" (Cross et al. 2010, 490; Farber and Sherry 2009, 81). "Precedent can be distinguished, read narrowly, revised in light of later cases, overruled, or even misinterpreted and manipulated, but it cannot be ignored" (Farber and Sherry 2009, 81).

The contention of this research is that terrorism cases present facts and situations that are unusual and extreme where the government is afforded greater leeway in its response to the perceived threat. These cases represent defendants who if released may present a significant danger to the lives of many Americans. The court, in *In re Terrorist Bombings* (2008), upheld the voluntariness of statements made by defendants who were held incommunicado in a prison in Kenya. The Second Circuit Court of Appeals that ruled on this case is located in New York City, one of the most likely terrorist targets in the United States. The defendants in the case were members of *Al-Qaeda* the same

organization responsible for the September 11, 2001 attack. The courts later used this case as a precedent in *United States v. Artis* (2010) to determine the voluntariness of a statement made by a prisoner held in a detention facility in the United States. *In re Terrorism Bombings* is an example of an extreme fact pattern with defendants who if released would likely try to kill more Americans. The case was tried in New York City, the target of high profile terrorist attacks on September 11, 2001 and in the attempted Times Square bombing. This case became a precedent used in a domestic criminal procedure case.

Precedents can be favorable to the government by extending policy established from these extreme cases to cover other criminal cases involving routine criminal procedure issues. The Second Circuit Court of Appeals in *In re Terrorist Bombings* could have followed cases such as *Haynes v. Washington* (1963) which held that holding a person incommunicado amounted to coercion rather than allow incommunicado statements to be used. Instead, the Second Circuit found that the statements were voluntary and not coerced. If the statements in *In re Terrorist Bombings* are voluntary, then it is likely the courts will determine that the statements in *United States v. Artis* are voluntary. While examples such as this can be found anecdotally, it would be helpful to determine if this type of influence from a terrorism precedent occurs in other cases and in other areas of case law.

To understand the impact of terrorism prosecutions on the development of case law, scholars may examine the utilization of these precedents, including the identity of the court that later relied on that case. Judicial opinions cite precedents and explain the reasons for following or not following the precedent. If precedents generated from

terrorism prosecutions are tools for the government, we should see that impact in the cases that cite the terrorism precedents as courts are pulled in a pro-government direction. If following cases such as *Khalil* and *In re Terrorist Bombings* is done because it assists the government, this is an indication of the policy impact of terrorism.

Chapter 2 examined *Miranda* issues in terrorism cases from the federal circuit courts of appeals. The chapter discussed rulings from terrorism cases, compared them with standards from previous law on confessions, and evaluated how the rulings in terrorism cases presented a change in doctrine. The second chapter highlighted how *Miranda* issues in terrorism cases were evaluated and how terrorism precedents were applied to common criminal justice cases, pulling the law of confessions in a direction that decreases individual protections and makes it easier for the government to use statements in court. This qualitative examination of the development of law in terrorism cases indicates terrorism cases will have an important impact on the judiciary.

A quantitative assessment of the impact of these developments is needed to assess the magnitude of this shift. While the qualitative assessment used in Chapter 2 provides for an in depth examination of specific cases, a quantitative look at the issue will help to determine if the findings from the qualitative inquiry can be applied more broadly. This will help both with an understanding of the influence of security issues on the judiciary as well as add to the scholarship on the development of law. To aid in this analysis, this research compares data from precedents established as a result of the prosecution of terrorists with a data set of precedents from the prosecution of drug cases.

Existing scholarship suggests that there is no consensus on a theory of why and when precedents are cited, followed, or distinguished in a judicial opinion. In

understanding the impact of precedents from drug and terrorism cases, it is important to understand where those precedents are used. Precedents can be binding on a court if the precedent is from a superior court (vertical *stare decisis*) or if the precedent is from a court in the same jurisdiction at the same level (horizontal *stare decisis*). Courts can also decide to use precedents from other jurisdiction in cases where the precedent is not binding, but persuasive. Precedents may also gain or lose strength over time. This research examines the location and timing of the use of precedents to determine what effects they have on the positive or negative treatment of the precedent.

There are reasons to believe binding and persuasive precedents will be treated differently. Mead (2011) and Lee (2005) were mostly concerned with binding precedent. Calderia (1983) and Glick (1992) studied persuasive precedents and Cross et. al. (2010) discussed both binding and non-binding precedent. As its name implies, binding precedent is more likely to be followed than non-binding precedent because of the norms of *stare decisis*. Precedents are expected to have a larger impact in courts where they are binding than in courts where they are persuasive. Cross et. al. (2010) point out that there is no accepted theory concerning when precedents are used. Non-binding precedents may be used to support the judicial decision of the court or they may be used for reference to help understand how a judge with a similar issue decided the case. While this research does not intend to discover an overall theory of why judges use precedents, it will aid in the understanding of the use of non-binding and binding precedents.

The involvement of the government is likely to influence how a precedent is treated. The government is advantaged in the court process as a repeat player. The government is more familiar with the court process and has more experience in litigation

which increases the likelihood that the government will win (Sheehan 1992, 28). The agencies involved in litigation are a part of the same government as the court. An impact of being a part of the government is that "judges feel some loyalty toward the government or regime of which they are a part" (Kritzer 2003, 343). Another reason for the success of the government in court proceedings are the resources available to the government. The government is able to hire capable lawyers familiar with the system as well as pay expert witnesses, pay for needed tests, or other resources that will assist in winning a case or hearing. The support of the government for a precedent is likely to influence how the precedent is treated.

The treatment of a precedent is likely to be influenced by how a lower court treated the precedent as well as the ideology of the judges involved. Cross demonstrated that circuit courts tend to affirm the decisions of lower courts despite the ideology of the judges involved (Cross 2003). He also found that the ideology of the judges influence the likelihood of affirmance with conservative circuit courts more likely to affirm the ruling of a conservative district court and liberal circuit courts more likely to affirm the ruling of a liberal district court (Cross 2003). Hansford and Spriggs also found that the ideological distance between the citing court and the precedent court impacted how a precedent was treated (2006). This research will examine these factors to determine their impact on whether a precedent is treated positively or negatively.

Another factor likely to influence the treatment of a precedent is how the precedent has been treated by other courts. Hansford and Spriggs refer to this as the vitality of the precedent (2006). A precedent that has been treated positively in the past increases its vitality thereby increasingly the likelihood that it is treated positively in the

instant case. Similarly, it would be expected that precedents that are unanimous or that are heard by all the judges in a circuit (*en banc*) are likely to have more vitality than precedents where a judge dissented or that are decided in a normal manner by a three judge panel. This research will take these factors into account in determining what characteristics of the precedent influence how the precedent is treated.

Issue Areas

To study the development of the law, this study uses two issue areas: the prosecution of terrorism cases and the prosecution of drug cases. While the law continuously changes and develops, these issue areas were chosen because they both present areas of national concern to which the criminal justice system has responded by increasing the amount of resources devoted to "prosecuting" these two "wars." Both issue areas present questions where judges must balance the rights of individuals against government efforts to expand its security operations and curtail some individual liberties. One scholar commented that "nothing in recent history has tested the balance between community security and individual autonomy, and between ends and means, more than two 'wars': first on drugs and now on terror" (Samaha 2011, 9). The primary focus of this research is the impact of precedents from terrorism prosecutions. Precedents from drug cases decided in the 1980s at the beginning of the crack cocaine epidemic provide a comparison data set.

While the threat of terrorism is not new, the events of September 11, 2001 brought a heightened sense of security to the United States. After September 11, many of the efforts of law enforcement and the resources of the government were moved to

protect the United States from a terrorist attack. This resulted in an increasing emphasis on the prosecution of terrorism cases. The second issue area this study will focus on is the prosecution of drug cases. Unlike the prosecution of terrorism cases, drug prosecutions occur with much greater frequency. While the urgency of terrorism prosecutions increased after September 11, 2001, the change in drug prosecutions occurred after the rise of crack cocaine in the 1980s. Both issue areas represent changes that occurred in society that affected the development of law in the criminal justice system.

Just as the terrorist attacks in New York City, Washington, D.C., and Pennsylvania highlighted terrorism as in important security issue, the rise of crack cocaine represented a new threat to society. The use of cocaine increased from 5.4 million people in the United States in 1974 to 21.6 million in 1982 to approximately 25 million in 1986 (Skolnick et al. 1997). Police response to street level drug dealing increased in the 1980s first with the response to "drug bazaars" and later with law enforcement units aimed specifically at crack cocaine (Belenko 1993). In 1986 alone, the New York City Police Department's anti-crack cocaine unit made thousands of arrests in an effort to fight the growing drug epidemic. Even before these efforts the numbers of arrests and drug related cases in the criminal justice system was increasing (Belenko 1993). Between 1980 and 1987 the number of drug arrests in the United States increased by 52 percent while at the same time the number of arrests for marijuana decreased (Belenko 1990).

Much of the emphasis on fighting drugs was due to the link between crack and violence. A study of New York City homicide rates in 1988 showed the over half of the

murders were drug related with majority of the drug related murders specifically related to crack cocaine (Goldstein et al. 1997). The murders were due both to users committing crime and to a larger extent to "systemic" causes such as fights over territory, punishment of workers, debt collection, robbery of drug dealers, and disputes over drug sales. In addition to the link with violent crime, the rise of crack cocaine was also related with the rise of gangs. Crack cocaine was a source of power for rogue elements of society providing them with a means to quickly make money. The violence associated with the drug as well as the empowerment of anti-social groups posed a security threat to society.

The small nature of coacine, the violence associated with crack cocaine, the high value for small quantities of the drug, and the lack of sophistication in making the drug presented search and seizure issues for law enforcement. Search warrants for crack cocaine were often carried out in high crime areas against criminals who had a vested monetary interest in evading capture. This meant that the tactics and procedures used by law enforcement had to evolve. Law enforcement officers had to adjust both to the increasing possibility of violence and the difficulty in physically finding the drug. Often crack cocaine was hidden in a manner and in places specifically to discourage law enforcement searches resulting in prosecutions and appellate case law in which fact patterns focused on the scope of a consent search for drugs on a person and whether a general consent to search a person includes the crotch area.[20] The need to combat the rise of crack cocaine, the portability of the drug, the violence associated with it, and its value all shaped federal criminal litigation and the body of criminal procedural law that accompanied this wave of prosecutions.

[20] See *U.S. v. Rodney*, 956 F.2d 295 (CADC 1992) and *U.S. v. Blake*, 888 F.2d 795 (CA11 1989) arriving at different conclusions.

Similar to crack cocaine, the threat from terrorism presents a changing security threat that is also evident in the development of the law. While terrorism existed prior to September 11, 2001, the events on this day presented the threat is a new way that changed the response from the United States government. Even with the prosecution of cases after September 11, there are many fewer terrorism cases compared to drug cases. Prior to September 11, airplane hijackings and other terrorist events were seen as extreme measures for publicity. The killing of approximately 3000 people on September 11 changed the view of terrorism from the primary focus of media attention to the primary focus of mass murder.

There is an expectation on the part of the public that the government will respond to the threat of terrorism to protect the United States. Opinion polls indicate that after a crisis such as the attacks of September 11, 2001, the public is willing to sacrifice civil liberties for security (Lewis 2005; Power 2006). In the frequently asked question asking respondents to identify the most important problem facing the country today, terrorism had never peaked above a half of a percent prior to 2001. In October of 2001, the problem of terrorism was cited as the most important problem by 46 percent of the respondents. Two separate polls issued in 2002 asked whether the public was more concerned about the FBI violating their civil liberties or not doing enough to gather information on terrorists; respondents overwhelming stated that they were more worried that the FBI was not doing enough rather than concerned about violations of their civil liberties (Lewis 2005; Power 2006). A public opinion poll taken in October 2001 showed that 65 percent of respondents wanted Congress to pass whatever law officials said they needed to protect the country even at the expense of civil liberties (Lewis 2005). While

these polls indicate the desire of the public for quick action, polls also show that concern for civil liberties returns the further away from the crisis the poll is taken.

The development of the law in security issues such as drugs and terrorism allows for the examination of the conflict between security and liberty. In *All the Law but One: Civil Liberties in Wartime* former Chief Justice William Rehnquist questions the effect of security concerns on court decisions. Similar to legal realists, he says that "the human factor...inevitably enters into even the most careful judicial decision" (Rehnquist 1998, 222). He then discussed the decision in *Duncan v. Kahanamoku* (1946) and questioned if it would been decided the same way if it was delivered in 1943 instead of 1946 as compared to the famous decisions in *Hirabayashi v. United States* (1943) and *Korematsu v. United States* (1944). The decision in *Duncan* declared the emergency actions of the state of Hawaii to maintain order were unconstitutional while the emergency actions in *Hirabayashi* and *Korematsu* were found to be legal. The important difference between the cases is that the decision in *Duncan* was handed down after the World War II was over while *Hirabayashi* and *Korematsu* were made during the war. Rehnquist's assertion is that decisions of the judicial system are influenced by the events around them particularly if they are cases involving the security of the country. Federal Appeals Court judge Richard Posner agrees saying, "judges, knowing little about the needs of national security, are unlikely to oppose their own judgment to that of the executive branch, which is responsible for the defense of the nation" (2006a, 9). Both Rehnquist and Posner believe that the decisions of the judiciary can be influenced by security concerns.

Jurisprudence related to terrorism and drug cases provide useful case studies for the development of the law. The issue areas are similar in that they both impact the

security of the country although in different ways. As mentioned above, the rise of crack cocaine was associated with an increase in violence in many communities. Terrorism increased as a national concern after September 11 and has continued to be a concern with prominent incidents such as the attempted Times Square bombing in New York by Faisal Shahzhad and the attempted suicide plane bombing with explosives hidden in his underwear by Umar Farouk Abdulmutallab. These issue areas present informative case studies of changes in society whose response affects the development of the law. Both of these issue areas present concerns for the protection of individual liberty while also maintaining order and protecting our society. They present an opportunity to examine the development of law in unique and changing issue areas.

While the cases present similarities there are a few important differences that shape this research. Terrorism prosecutions are much less common than drug prosecutions. Even with the increase in terrorism prosecutions since September 11, 2001, drug cases greatly outnumber terrorism cases. While terrorism has been around for some time, there has been much greater development in the law in drug cases. For this reason, the analysis of the development of law in drug cases will be restricted to the 1980s, concentrating on judicial treatment of precedent in drug cases during the time of the rise of crack cocaine (while the analysis of terrorism cases will not be limited in the time period for analysis). Also, while drug offenders represent dangerous criminals, terrorism cases are more serious. Releasing a drug offender means that individual can sell drugs again while releasing a terrorist suspect may, as Justice Scalia stated, "cause more Americans to be killed" (*Boumediene v. Bush* 2008, 2294). Because terrorism cases are less common and more serious, it would be expected that courts give greater deference to

the responses from the United States Government in appeals involving terrorism prosecutions (when compared to drug prosecutions).

Data Set

In discussing both issue areas, this research focuses on the development of the law as a result of judicial treatment of precedents decided in the Federal Circuit Courts. Unlike US Supreme Court precedents, circuit court precedents often involve "routine" issues due to the mandatory docket of these courts. For lower courts in the circuit and subsequent panels in the same circuit, these precedents will be binding. These effects will be particularly pronounced in lower federal courts that have high caseloads, forcing judges to rely on precedent and the reasoning of previous cases more than justices of the Supreme Court who have more time to examine and ponder decisions. Relatively few terrorism cases have been decided by the US Supreme Court, limited to cases involving habeas corpus,[21] the use of a compounding felony statute,[22] and the constitutionality of a material support for terrorism law.[23] While the majority of legal scholarship examines events on the Supreme Court, the federal courts of appeals hear a great many more cases that have the possibility of being used as precedent. This is not to say that the study of law at the Supreme Court level is not important, but rather to emphasize that more law develops at lower court levels.

[21] See *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rusmfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008).
[22] *U.S. v Ressam*, 553 U.S. 272 (2008).
[23] *Holder v Humanitarian Law Project*, 561 U.S. ____, 130 S. Ct. 2705 (2010).

Precedents from the Federal Circuit Courts are cited by different courts. When they are cited by lower federal courts in their same circuit the precedents are binding. When the precedents are cited by other federal courts not in their circuit or by state courts the precedents are not binding, but persuasive. The research includes citations to precedent from inside and outside the circuit. As mentioned previously, there is no accepted theory of why a specific precedent is cited. This research will examine both binding and persuasive precedents looking at where they were used.

To compile a list of potential "parent" precedents decided in the circuit courts, this analysis drew on multiple sources. The Center for Law and Security as well as the Transactional Records Access Clearing House (TRAC) both have lists of terrorism cases that are being prosecuted in the criminal justice system. The federal government also published a list of terrorism convictions on the Department of Justice website. While all three lists are useful for looking at cases, none of the lists were identical and they provide little information on how these decisions influenced other cases. These lists only contained information on the initial prosecution rather than appellate information. Since this research concentrates on the development of law and the influence of terrorism prosecutions on the judiciary, the lists provide information that there is an influx of cases presenting unique fact patterns, but locating appellate decisions required additional searches.

To find appellate decisions, the list of terrorism cases published by the Department of Justice was examined. Included in the list was information on the statute(s) the federal government used to prosecute the alleged terrorists. The list is divided into Category I and Category II offenses. Category I offenses are the primary

statutes used to prosecute terrorism cases. Some of the charges are broad criminal charges such as kidnapping while others are more specific to terrorism such as Providing Material Support to Terrorists. Category I cases are defined as cases directly related to terrorism while Category II cases involved defendants charged with non-terrorism offenses, but who may have had a link to terrorism. Category II offenses are not used because by their definition they were not cases directly related to terrorism, but rather cases involving firearms, drugs, immigration, and similar offenses.

With the list of offenses used to prosecute terrorism cases, this study created a list of appellate decisions on terrorism was by searching on LexisNexis Academic, using their legal search tools for Federal and State Cases. Jurisdiction for the search was limited to "All U.S. Courts of Appeals." The search terms used were the code sections listed for the Category I offenses. For example, Aircraft Sabotage is 18 U.S.C. § 32 so the term 18 U.S.C. § 32 was searched for everywhere in the case. This produced a list of cases where Aircraft Sabotage was listed as an offense. Each of the cases was read to determine if the case involved prosecution for an act of terrorism. The definition of terrorism used was the definition listed in the federal statute 18 USCS § 2331. This statute defines international terrorism and domestic terrorism as:

> (1) the term "international terrorism" means activities that--
> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
> (B) appear to be intended--
> (i) to intimidate or coerce a civilian population;
> (ii) to influence the policy of a government by intimidation or coercion; or
> (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping;
> The statute defines domestic terrorism as:

5) the term "domestic terrorism" means activities that--

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

(B) appear to be intended--

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

Cases that did not meet this definition of international or domestic terrorism were not used. Cases that did meet this definition were queried using Shepard's Citation to determine if the cases had been cited. If the case had been cited and met the definition for terrorism, it was included as a precedent case (also referred to as a parent case).

In addition to analyzing terrorism cases, this study also examines the development of law in drug cases. To identify precedents, a search of appellate court drugs cases was conducted. LexisNexis Academic was used to conduct the searches and only cases from the federal courts of appeals were searched. To create this list of precedent cases, Lexis/Nexis Academic was searched using the search terms "Fourth Amendment" and "drug." The connection term "and" was used meaning both terms had to be present and the criteria that both terms had to be listed at least five times was selected. This produced a list of 2590 cases. The search was limited to cases decided between the years 1980 and 1989 which roughly coincides with the evolution of the war on drugs.

Since these observations were being used for comparative purposes only, the number of precedents for the analysis was restricted to make the project feasible. To create a manageable number of precedents for analysis, the search was limited to cases that were cited at least twenty but not more than twenty-five times with positive or negative treatment (positive treatment means the Shepard's Citation showed the case was

followed, negative treatment means the Shepard's Citation showed the case distinguished, criticized, limited, questioned, overruled). Further, the drug cases were excluded if the decision had been explicitly overturned according to Shepards Citation to focus this research on broader trends in valid case law. While this limits the generalizability of the analysis, including cases overruled would substantially shift the scope of the study. To focus on criminal procedure precedents and progeny, precedents dealing solely with sentencing were not used.

The number of citations for each precedent varies. In deciding which parent cases to include in the drug data set, the initial assessment of the number of times cited was only an estimate. Until all cited cases are read it is not possible to determine if they can be included in the data set. For example, some of the citations were decisions of a federal magistrate court judge that were only recommended decisions. In most instances the district court adopted the finding of the federal magistrate, but in some instances the district court did not adopt the finding of the federal magistrate or there was no record that the federal magistrate adopted the decision. If it could not be verified that the decision of the magistrate was adopted by the district court, the decision was not used. Other cases turned out to be duplicate decisions, cases where no information was listed, or for other reasons could not be listed in the data set. A list of coding treatment is including in Appendix B.

Information from the parent cases (the precedents) was recorded for use in this analysis. In addition to the identifying information about the precedent such as the name, citation, court and docket number, other characteristics were recorded such as the name of the writing judge, the party affiliation of the writing judge, whether the case was heard

en banc, whether a judge dissented from the opinion, whether a concurring opinion was written, the size of the winning coalition, whether the decision favored the government, and the date of the decision. A list of the parent precedents used in this analysis can be found in Appendix A.

The parent cases for the terrorism data set consist of forty-three parent cases beginning with *United States v. Dizdar* in 1978 and ending with *United States v. Farhane* in 2011. The search revealed cases from all of the federal appellate circuits except the Eighth Circuit. The Second Circuit had the most cases with nine, followed by four other circuits with five. Below is a list of the each circuit and the number of parent cases:

Table 4.1: Terrorism Parent Cases by Circuit

Circuit	Parent Cases in Data Set	Percentage
First Circuit	2	4.65%
Second Circuit	9	20.93%
Third Circuit	1	2.33%
Fourth Circuit	5	11.63%
Fifth Circuit	2	4.65%
Sixth Circuit	3	6.98%
Seventh Circuit	3	6.98%
Eighth Circuit	0	0.00%
Ninth Circuit	5	11.63%
Tenth Circuit	5	11.63%
Eleventh Circuit	5	11.63%
D.C. Circuit	3	6.98%
Total	**43**	**100.00%**

The Second Circuit is physically located in New York City. Obviously there have been a number of terrorist incidents in New York City including the first World Trade Center bombing, the September 11, 2001 attack, and the attempted Times Square attack by Faisal Shahzad among others. The large population, large immigrant population, and the high profile nature of the targets in the city may explain why there are so many more cases originating in the Second Circuit.

The Fourth, Ninth, Tenth, and Eleventh Circuits all have five cases represented in the parent dataset. One can speculate on why these circuits are represented more than the

others. These circuits have a large number of immigrant cases as well as high profile terrorist targets that may create an increased number of terrorist incidents. The Ninth Circuit is the largest of the federal circuit with the most cases in its court system which may help to explain why it is represented more than the others. The Fourth Circuit includes Virginia and areas close to the capital of the United States which may help to explain the large number of cases. The Eastern District of Virginia has a history of high profile criminal cases which may help to explain the large number of parent cases from the Fourth Circuit. The Tenth Circuit includes Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming while the Eleventh Circuit includes Georgia, Florida and Alabama.

The search for the parent drug cases produced thirteen cases. The search was limited to cases from 1980 to 1989 with approximately twenty citations. The First, Fifth, and Ninth Circuits produced the most parent cases with three. There were no cases from the Second, Third, Fourth, Eighth, Eleventh, or D.C. circuits. The breakdown of circuits is listed below:

Table 4.2: Drug Parent Cases by Circuit

Circuit	Parent Cases in Data Set	Percentage
First Circuit	3	23.08%
Second Circuit	0	0.00%
Third Circuit	0	0.00%
Fourth Circuit	0	0.00%
Fifth Circuit	3	25.00%
Sixth Circuit	2	16.67%
Seventh Circuit	1	8.33%
Eighth Circuit	0	0.00%
Ninth Circuit	3	25.00%
Tenth Circuit	1	8.33%
Eleventh Circuit	0	0.00%
D.C. Circuit	0	0.00%
Total	**13**	**108.33%**

The parent cases for the drug court prosecutions were not evenly distributed among the circuits as shown in Table 4.2. Again, as the largest circuit, the Ninth Circuit is well represented. Several circuits are not represented, but this is most likely due to the requirements to be included in the dataset. Parent cases needed to have approximately twenty citations although after reading the citations, those numbers increased for some parent cases and decreased for others.

The cases in the drug court data set were more evenly represented with the average case being cited twenty-six times in the data set. The case with the least number

of citations had seventeen and the most frequently cited parent case was listed forty-two times. The number of citations for each case in the terrorism parent data set varies greatly with an average of ten citations per case. There were eighteen cases that were cited five or fewer times and six cases that were cited only one time each. There were four terrorism parent cases that were cited over thirty times and one case cited fifty-five times. The list of parent (precedent) cases and the number of times each case was cited in the data set can be found in Appendix A.

The units of analysis for the models are the individual citations to precedent. Some cases cite more than one precedent in this research and may be listed more than one time in the data set. For example, in the terrorism data set, *United States v. Kassir*, a "progeny" cites two terrorism "parent" precedents, *United States v. Hammoud* and *United States v. Aref*. Each citation to precedent is listed as an observation in the data set. To assist in the analysis of what factors influence the treatment of precedent, several factors about the citations are recorded including the name, docket, court citation, name of the court, date, writing judge, other judges participating, party affiliation of the writing judge, whether the precedent was treated positively or negatively, the outcome of the case, whether the decision favored the government, if the government was the appellant, the issue area involved, and the area of criminal law.

Hypotheses

The use of precedents by courts is an understudied area of judicial politics (Cross et al. 2010). Research indicates that lower federal courts follow the preferences of superior courts (Brent 1999; Songer, Segal, and Cameron 1994) and that district courts

follow the preferences of circuit courts (Cross 2003). Previous research shows that vertical *stare decisis* is important in lower federal courts and is an influence on judicial decisions (Segal 2011). Horizontal *stare decisis* is also important in the federal circuit court of appeals and influences the decision of circuit panels (Lee 2003). Hansford and Spriggs examined precedents from the Supreme Court finding that the ideological distance between the citing court and the precedent court was influential on how the precedent was treated as well as vitality of the precedent (2006).

The use of terrorism precedents is likely to have an effect on the judiciary. As terrorism cases are prosecuted and precedents from those cases are created, these precedents will be applied to common criminal procedure issues. As former Attorney General Michael Mukasey points out, these precedents "will infect and change the standards in ordinary cases" (2007). Research has shown that the courts will show more deference to other branches of government in terrorism cases than other criminal cases (Bradley-Engen, Damphousse, and Smith 2009; Sunstein 2008b). Scholars theorize that as security concerns increase, court decisions adapt to the changing conditions to increase the power of the government to respond to the security concern (R. Posner 2006a; Stuntz 2001). Other scholars compare the influence of terrorism cases to the war on drugs suggesting that the prosecution of terrorism cases will influence the courts in a similar manner to drug concerns (Weisselberg 2008).

This research analyzes the use of precedents from two issue areas: terrorism cases and drug cases. These two issue areas represent areas of concern to the broader public. The drug case precedents used are case from the 1980s that coincide with the rise of crack cocaine as a security threat. All the precedents are from the federal circuit courts of

appeals.[24] After the precedents were identified, they were queried using Shepard's Citations to identify citations to the precedents, where they were used, and how they were treated. Based on scholarship this research focuses on testing the following four hypotheses:

Hypothesis 1: When the outcome favors the government, the citing court (the progeny) is more likely to treat the cited precedent (parent) more favorably.

Hypothesis one tests the influence of security precedents. Precedents from security cases provide precedents that can be used to support the position of the government in subsequent cases whether those cases pertain to security or not. Chapter 2 discusses the influence of terrorism cases on the development of law in cases involving confessions. While there are only a limited number of precedents dealing with confessions from the circuit courts of appeals, the government prevailed in each case. The precedents have also been cited by domestic criminal justice cases that do not involve terrorism. The result is that confession law is pulled in a conservative direction that favors pro-government decisions. Gathering data from a broader set of cases is important to see if this influence can been seen in more than just a limited number of terrorism cases.

In the American legal system, the norm of *stare decisis* encourages judges to apply holdings from previous established cases to the current case. As precedents are established, they provide a guide for courts to resolve cases or controversies. Cases involving security issues are likely to favor the government because the outcome impacts

[24] In this study, precedents from terrorism or drugs cases are sometimes referred to as parent cases of the citing cases and the citing cases are sometimes referred to as progeny.

the safety of our society. Many judges view the cases as Justice Scalia did in *Boumediene v. Bush* (2008) where Scalia believed the outcome of the case would determine if more Americans would be killed or not. Stuntz (2001) and Posner (2006a) both noted that as threats to our security increase, the government is more likely to prevail in criminal procedure issues. These precedents affect more than their own cases; rather, they continue to influence future cases as they are applied to other criminal procedure cases. One way to determine the influence of the created precedents is to see if the government influences the positive treatment of the security precedents. When the precedent is used, is it treated positively when the government wants it to be treated positively? If the precedent is creating a neutral standard, then following the precedent should not be affected by whether the government wants the court to follow it. If the precedent pulls the judiciary in a pro-government direction, the precedent should be followed when the government wants it to be followed. Using the example of *Khalil*, the hypothesis is that *Khalil* is followed when doing so is beneficial to the government in allowing statements to be admitted into court. In *United States v. Abu Ali* (2008), a suspect was questioned by American authorities while in Saudi Arabian custody, but the court ruled that *Miranda* did not apply. The precedent from *Abu Ali* favors the government and is likely to be followed when its use favors the government. While these two examples appear to be obvious, precedents from terrorism cases are used in many different areas and for many different reasons. If they are pulling the judiciary in a pro-government direction, the precedents will be treated positively when their use favors the government. If the standards created by the precedents are neutral, then the precedents

should be able to be used in cases where the government does not prevail in the outcome of the case as well as in cases where the outcome does favor the government.

Prior to the prosecution of the war on terrorism, drug cases were similarly viewed as important cases that affected the security of the country (Samaha 2011; Stuntz 2001; Weisselberg 2008). Drug cases have influenced the development of law in several different areas including the good faith exception, the exclusionary rule, the use of informants, searches of parolees, and many others. The rise of crack cocaine brought with it an increase in violence which created security concerns in many communities. The development of law from drug precedents from the 1980s provides a useful data set to compare terrorism precedents. The two progeny data sets used in this research represent cases that cited precedents decided by circuit courts involving drug prosecutions from the 1980s or terrorism prosecutions from 1978 to 2011. Cases involving issues where the government is expected to respond to dangerous situations to protect the public are likely to create precedents that favor the government. When these precedents are used, they will create instances where their application will favor the government in both security and non-security issues. The cases that cite these precedents are likely to treat the precedents positively when doing so favors the government. Once the precedents from terrorism cases are created, their impact on the cases that cite them will favor the government.

Since this study looks at the development of law over time, it is important to include time as a variable. Precedents may become established and thus less likely to be treated negatively or they may be diminished over time. Two studies found that the use and influence of precedent decreased as the precedents aged although this was not the

focus of either study (Kosma 1998; Landes and R. Posner 1976). Hansford and Spriggs did not focus on age in their study but their results show that age is negatively related to the favorable treatment of precedent and age squared is positively related to the favorable treatment of precedent (2006). This is similar to Brenner and Speath's assessment of the strength of precedent finding that some precedents were likely to be treated negatively during the initial years after they were decided while others become "sacrosanct" and were less likely to be treated negatively (Brenner and Spaeth 1995, 29). There is no consensus view of the effect of age on precedent as can be seen through the finding of Hansford and Spriggs.

One of the major findings of Hansford and Spriggs (2006) concerned the concept of precedent vitality. Precedents that are seen as vital or strong are less likely to be treated negatively. In looking at the decisions of other courts, a court may see that a similar decision was based on a certain precedent. The more the precedent is treated positively, the more other courts see the precedent as a basis of decision and rely on it as precedent. Precedents that have been treated positively in the past are more likely to be treated positively in the future.

Similar to positive treatment, negative treatment decreases the vitality of a precedent. When courts negatively treat a precedent they show that the legal reasoning that is the basis for the precedent is not sound. When considering a similar issue, a court can see that the precedent has been negatively treated meaning that the judge did not find the legal reasoning in the case persuasive. This influences the future treatment of the precedent by other courts.

The vitality of a precedent may vary depending on the reason it was cited. In *United States v. Bengivenga,* two individuals were questioned at a border checkpoint. Their luggage was removed from the bus they were on and searched. This precedent was cited both as a precedent for the questioning of a suspect as well as or the search of the defendant's luggage. The legal holding for the search is different than the legal holding for the questioning of the suspects. Subsequent case law may determine that a search of luggage similar to this violates the Fourth Amendment, but the questioning of the suspects may continue to be valid case law. The vitality of the precedent for this case depends on the reason the precedent was cited. A more accurate measure of vitality would take into account the issue area concerning why the precedent was used.

There are other indications of the legal strength of a precedent. When a circuit court of appeals hears a case, they normally sit in three judge panels. On some occasions, the circuit court may decide to hear a case *En Banc* or with all the judges on the circuit hearing the case. When a case is heard *En Banc* it is an indication that it is an important decision since all the judges participate. The presence of a dissenting opinion may cast doubt on the legal holding of the case (Aldisert 1989; C. Johnson 1987). While most decisions in the federal circuit courts are unanimous, a dissenting opinion may operate as a flag that the legal reason stated in that opinion may change or may not be based on solid legal reasoning.

These ideas present the following hypotheses about the strength of a precedent:

Hypothesis 2: The older a precedent, the more likely the citing court will treat it positively.

Hypothesis 3: The greater the precedent vitality, the more likely the citing court will treat it positively.

The concept of vertical *Stare Decisis* "refers to the requirement that lower tribunals within a court structure follow the decisions of higher tribunals" (Sloan 2009, 717). Horizontal *Stare Decisis* "refers to the rule that courts adhere to their own prior decisions" (Sloan 2009, 717). It would be expected that precedents have the greatest influence inside their own circuit due to *Stare Decisis*. Several studies have found that the circuit courts of appeals are responsive to the precedents of the Supreme Court (Gruhl 1980; Songer and Sheehan 1990; Songer, Segal, and Cameron 1994; Brent 1999; Songer and Haire 1992). Other studies examined circuits and how the circuit courts treat their own precedents (Lee III 2003; Mead 2011). They both found respect for horizontal and vertical *stare decisis*.

Studies concerning the responsiveness of the circuit courts to decisions of the Supreme Court have found that the circuit courts are responsive, although there is some disagreement as to the reason for the responsiveness (Klein and Hume 2003; Songer, Segal, and Cameron 1994). Circuit courts hear a much larger number of cases than the Supreme Court so the fear of reversal by district courts is more likely. The increased chance of reversal should create an incentive for district courts to follow the precedents of circuit courts. Conversely, courts could be more likely to treat precedents favorably from outside the circuit. When a precedent is merely a persuasive precedent, there could be little reason to cite the precedent other than to follow its holding.

While the treatment of precedent is important, the mention of a precedent in a case is also an indication of *stare decisis*. As Judge Posner points out, even negative treatment of precedent is "motivated by the authority of the previous case" (2000, 385).

When a court distinguishes a precedent is "acknowledges its importance in the corpus of *stare decisis*" (Cross et al. 2010, 521). The citing of a precedent, even when the precedent is treated negatively, acknowledges the authority of the precedent must be explained. For this reason, simply counting the number of precedents used as where they are used can help to understand the influence of precedent in addition to examining how the precedents were treated.

Hypothesis 4: Parent precedents from both the drug data set and the terrorism data set will be more influential in their own circuits than in other circuits.

Dependent Variables

In the multivariate analysis, the dependent variable is the treatment of precedent by the citing court. When parent cases are cited they can be used in a string citation without any analysis, positively treated, negatively treated, or cited but not treated positively or negatively. A judge can positively cite the precedent following the holding in the previously cited case as it applies to the current case. Judges can also negatively treat the precedent explaining that the reasoning used in the precedent case does not apply to the current case under consideration.

Shepard's Citations provides a useful tool for determining how a precedent was used in a citing case. A methodology for using Shepard's to analyze precedents was established by Hansford and Spriggs (2006). They conducted validity tests to ensure that the coding scheme they used was accurate and reliable. Cases were coded as treating a precedent positively if Shepard's reported the treatment as "followed." Cases were coded as treating the precedent negatively if Shepard's reported the treatment as

"distinguished," "limited," "criticized," "questioned," or "overruled." If the citing case simply listed the precedent without explanation of how the precedent applied to the issue under consideration then the citing case was not used in the data set. Similarly, if Shepard's reports the citing case treatment of the precedent as "harmonized" or "explained" it is not used in the data set because this is considered neutral treatment. A logit model is used because the dependent variable is dichotomous.

Logit models are used to estimate the effects of the independent variables. The cases in the data set cite a common list of precedents used to create the data set. To account for the correlations among the citations to precedent caused by citing cases being listed more than once and from the origin of the cases coming from a common set of precedents, the logit models are clustered on the precedents and the citing cases. This provides for standard errors that are corrected for the correlations among the data. The results report the models not clustered, clustered on the citing case, and clustered on the parent precedent.

Table 4.3: Summary of Variables – Influence of Precedent

Positive/Negative treatment of Precedent	Coded 1 if the case followed the precedent and 0 if the case treated the precedent negatively – dependent variable
Pro-government	Coded 1 if the decision was in favor of the government and 0 if not
Precedent Pro-government	Coded 1 if the precedent decision favored the government
Time Since Precedent (Days)	The number of days between when the citing cases treated the precedent and when it was decided
Time Since Precedent $(Days)^2$	The time since the precedent was decided squared
Ideological Difference	Coded 1 if the judge writing the opinion differs from the party of the judge who authored the precedent
Deference to Lower Court	If the reviewing court followed the lower court decision (1=yes, 0= no)
Government Appellant	Coded 1 if the government was the appellant in the case
Vitality	Number of times treated positively minus times treated negatively in issue area
Parent Decision Unanimous	Coded 1 if the parent decisions was unanimous
Parent Decision *En Banc*	Coded 1 if the parent case was heard *En Banc*
Outside Circuit	Coded 1 if the case citing the parent was outside the circuit of the parent case
Federal Circuit Court Opinion from the same Circuit	Coded 1 if the case citing the parent was a Circuit Court Opinion from the same circuit
Federal District Court	Coded 1 if the case citing the parent was a federal district court
State Court	Coded 1 if the citing case was a state court case

Independent Variables

The primary independent variable is whether the decision favored the government. Depending on the facts of a case, the government may want a precedent to be positively or negatively treated. This variable helps to determine if the precedent is treated positively when this positive treatment favors the government. Each decision was read to determine if the ruling favored the government or favored the defense. If the decision favored the government it was coded as 1 and if the decision did not favor the government it was coded as 0.

Two variables for time were used: age and age squared. The study by Hansford and Spriggs (2006) show that age is related negatively to the treatment of a precedent and that age squared is positively associated with the treatment of a precedent. The variable of time is reported in days since the precedent was decided. Because judges have a number of precedents to choose from, they are likely to cite older precedents if they are relying on them for legal authority. This reasoning indicates that as time passes, the likelihood that a precedent is treated positively should increase.

This research also examines the strength of a precedent referred to by Hansford and Spriggs (2006) as the vitality of the precedent. They measure vitality by counting the number of times a precedent has been treated positively and subtracting the number of times it was treated negatively. The measure of vitality in this study is specific to the issue area rather than calculated from anytime the precedent cited. A precedent can be cited by one court for a search and seizure issue and a different court for sentencing. The vitality of the precedent in one area may not affect the vitality of the precedent in a different area. This research measures specifically the vitality of the precedent by issue

area by adding the number of times a precedent has been treated positively in a specific issue and subtracting the number of times the precedent was treated negatively in that issue area at the time the precedent is cited. Each time a precedent is cited it either adds to or subtracts from the vitality of the precedent. For example, if the precedent was cited positively three times for search and seizure issues and not treated negatively, the vitality would be reported as three. If the precedent was treated positively twice when it was used as a precedent for sentencing and treated negatively once, the vitality of the precedent would be reported as one. This should provide a more specific measure of vitality. This measure of vitality should be an indication of the strength of a precedent.

There are other indications of the strength of a precedent. This study includes dichotomous variables for unanimous and *en banc* decisions in addition to the measure of precedent vitality. The variable for *en banc* is coded as 1 if the precedent that was cited was an *en banc* decision and 0 if it was not. Similarly, the variable for unanimous decision is coded as 1 if the precedent that was cited was unanimous and 0 if it was not. Precedents that are decided *en banc* and that are unanimous should be more likely to be treated positively because they are indications of the legal strength of a decision.

Two variables are used to examine the influence of a precedent where it was cited. Dichotomous variables for whether the court citing the precedent was located inside the same circuit where it was used and a second dichotomous variable is used to indicate whether the precedent was cited in a state court case. If the citing court was inside the same circuit as the precedent, the variable was coded as 1 and 0 if not. The variable for state is coded as 1 if the citing case is a state court case and coded as 0 if it is

not. These variables will indicate the influence of *stare decisis* and help to explain where precedents have the most influence.

Control Variables

There are several variables that are also important to consider when modeling judicial treatment of precedent. Numerous studies have shown that judges are influenced by their policy preferences and a study of this nature should consider the impact of judicial ideology. Currently, there is no measure for the ideological scores of judges that can be used for comparison between federal circuit, district, and state courts. For this study the party affiliation of the judge writing the opinion is used to represent the ideology of the judge. The party affiliation of the writing judge of the parent case and the citing case were both obtained. In some cases, the party affiliation of the citing judge could not be determined so that case was not used in the analysis. Hansford and Spriggs found that the ideological distance between the court citing the case and the court of the precedent influenced the treatment of the precedent (Hansford and Spriggs 2006, 74). To account for this, a variable was created to determine if the judge writing the citing case was from a different party than the judge who wrote the opinion in the precedent case.

The government can win or lose a criminal case in the trial court. Often this means that the case is over and the suspect can go free. In some limited circumstances, the government can and will appeal the decision to a higher court. When the government decides the case is important enough to appeal, the government is likely to win. It is expected that the government would appeal those cases that it thinks it is likely to win. At the trial level, the government may bring forward cases that it does not feel it is likely to win for many reasons. The government may prosecute a case to let a victim have her

day in court, because the case is too important to drop, or because it feels it needs to try to get an important offender off the street even if the government is not likely to win the case. On appeal, the government may be more selective about which cases it decides to appeal and more likely to prevail in those appeals. When the government is an appellant, this is likely to act as a signal to the court that the case needs to be reviewed closely similar to the Solicitor General on the Supreme Court (Caldeira and Wright 1988). For this reason, a control variable for government appellant was created.

Another influence on the treatment of precedent and the outcome of the case is the ruling of the original court. A reviewing court is likely to strongly consider the actions and opinions of the original judge's opinion in a case (Cross 2003). To control for this, a variable was created to account for the deference a reviewing court may show to the original court. A dichotomous variable was coded for each instance the reviewing court ruled and treated the precedent in the same manner as the original court.

It is possible that whether the government won in the precedent case will determine if the government wins in subsequent cases. The citing cases may have facts similar to the precedent cases and rather than the influence of precedent, the results indicate cases that have similar facts. The fact that the precedents favored the government may influence their use by the citing case. To control for this, a variable for the precedent was created to code for whether the precedent favored the government. The results are reported with and without this control variable.

Control variables are included for deference to the lower court, for whether the government is the appellant in the case, whether the government won in the precedent, and for the ideology (political affiliation) of the judge. The party affiliation from judges

was determined from the Attributes of U.S. Federal Judges Database and from internet searches.

CHAPTER 5

PARENTS AND PROGENY

> The doctrine of *stare decisis* provides the means by which courts assure that the law will not merely change erratically, but will develop in a principled and intelligible fashion; the doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact…
>
> - Justice Thurgood Marshall
> *Vasquez v. Hillery* (474 U.S. 254)

The concept of *stare decisis* is one of the foundations of the American legal system. *Stare decisis* means that judges apply the legal reasoning from prior cases to cases with similar fact patterns. Judges reason by analogy and apply the legal reasoning from one case to another. Court decisions rarely "define doctrine in a comprehensive or complete manner" (Hansford and Spriggs 2006, 5). Legal rules evolve over time as precedents are interpreted. Justice Scalia said, "The law grows and develops, the theory goes, not through the pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time" (Scalia 1989, 1177).

Before examining the determinants of the judicial treatment of precedent, this chapter provides an overview of the characteristics of the parent precedents and their progeny. The precedents used in the research are from the federal appellate court level in the issue areas of terrorism prosecution and drug prosecutions. Once the parent precedents were identified (as discussed in Chapter 4), they were Shepardized to identify

the progeny cases. A summary listing of parents and progeny are provided in Tables 5.1 and 5.2 below.

Table 5.1: Parent Cases in Drug Precedent Data Set

Case	Court	Date	Times Cited	Unanimous	En Banc	Pro-Gov
United States v. Hensel	First Circuit	1/25/1983	17	Yes	No	Yes
United States v. La France	First Circuit	7/17/1989	18	Yes	No	Yes
United States v. Castillo	Ninth Circuit	11/5/1987	21	No	No	Yes
United States v. Lambert	Sixth Circuit	8/16/1985	21	Yes	No	Yes
United States v. Stone	Tenth Circuit	1/25/1989	23	Yes	No	Yes
United States v. Silvestri	First Circuit	4/1/1986	24	Yes	No	Yes
United States v. Vasey	Ninth Circuit	5/8/1987	24	Yes	No	No
United States v. Andrus	Seventh Circuit	10/22/1985	25	Yes	No	Yes
United States v. Walther	Ninth Circuit	2/19/1981	27	Yes	No	No
Horton v. Goose Creek	Fifth Circuit	11/1/1982	29	Yes	No	No
United States v. Berry	Fifth Circuit	3/19/1982	32	No	Yes	Yes
United States v. Bengivenga	Fifth Circuit	5/25/1988	35	No	Yes	Yes
United States v. Sangineto-Miranda	Sixth Circuit	10/27/1988	42	Yes	No	Yes

Table 5.2: Parent Cases in Terrorism Precedent Data Set

Case	Court	Date	Times Cited	Unanimous	En Banc	Pro-Gov
United States v. Herrera	Eleventh Circuit	8/19/1983	1	Yes	No	Yes
United States v. Aref	Second Circuit	7/2/2008	1	Yes	No	No
United States v. Dizdar	Second Circuit	7/27/1978	1	Yes	No	Yes
United States v. Ashqar	Seventh Circuit	10/2/2009	1	Yes	No	Yes
United States v. Cleaver	Tenth Circuit	12/6/2005	1	Yes	No	Yes
United States v. Nichols	Tenth Circuit	12/18/2000	1	Yes	No	Yes
United States v. Marcano-Garcia	First Circuit	5/29/1980	2	Yes	No	Yes
United States v. Ressam	Ninth Circuit	11/2/2009	2	No	No	Yes
United States v. Farhane	Second Circuit	2/4/2011	2	No	No	Yes
United States v. Lakhani	Third Circuit	11/28/2006	2	Yes	No	Yes
United States v. Chandia	Fourth Circuit	1/23/2008	3	Yes	No	Yes
United States v. Tankersley	Ninth Circuit	5/5/2008	3	Yes	No	Yes
In re Terrorist Bombings (552 F.3d 157)	Second Circuit	11/24/2008	3	Yes	No	Yes
United States v. Al-Moayad	Second Circuit	10/2/2008	3	Yes	No	No
United States v. Hossein Afshari	Ninth Circuit	9/9/2003	4	Yes	No	Yes
United States v. Abdi	Sixth Circuit	9/22/2006	4	No	No	Yes
United States v. Polk	Fifth Circuit	7/17/1997	5	Yes	No	Yes
United States v. Johnson	First Circuit	12/19/1991	5	Yes	No	Yes

United States v. Hassoun	Eleventh Circuit	1/30/2007	6	Yes	No	Yes
United States v. McKinley	Eleventh Circuit	7/16/1993	6	Yes	No	Yes
United States v. Nettles	Seventh Circuit	2/12/2007	6	Yes	No	Yes
United States v. Stone	Sixth Circuit	6/22/2010	7	No	No	Yes
United States v. Dowell	Tenth Circuit	12/6/2005	7	Yes	No	Yes
United States v. Hir	Ninth Circuit	1/22/2008	8	Yes	No	Yes
In re Terrorist Bombings (552 F.3d 177)	Second Circuit	11/24/2008	9	Yes	No	Yes
In re Terrorist Bombings (552 F.3d 93)	Second Circuit	11/24/2008	9	Yes	No	Yes
United States v. Mandhai	Eleventh Circuit	7/2/2004	10	No	No	Yes
United States v. Benkahla	Fourth Circuit	6/23/2008	11	Yes	No	Yes
United States v. Layton	Ninth Circuit	6/17/1988	11	Yes	No	Yes
United States v. Arnaout	Seventh Circuit	12/2/2005	12	Yes	No	No
United States v. Yunis	D. C. Circuit	1/29/1991	13	Yes	No	Yes
United States v. Yunis	D. C. Circuit	1/30/1989	13	Yes	No	Yes
United States v. Evans	Eleventh Circuit	2/16/2007	14	Yes	No	Yes
United States v. Khan	Fourth Circuit	9/1/2006	14	No	No	Yes
United States v. Khalil	Second Circuit	5/31/2000	14	Yes	No	Yes
United States v. Rezaq	D. C. Circuit	2/6/1998	17	Yes	No	Yes
United States v. Wise	Fifth Circuit	7/31/2000	19	Yes	No	Yes

United States v. Abu Ali	Fourth Circuit	6/6/2008	20	No	No	Yes
United States v. Nichols	Tenth Circuit	2/26/1999	26	Yes	No	Yes
United States v. Hammoud	Fourth Circuit	9/8/2004	32	No	Yes	Yes
United States v. McVeigh	Tenth Circuit	9/8/1998	32	Yes	No	Yes
United States v. Graham	Sixth Circuit	12/17/2001	34	No	No	Yes
United States v. Yousef	Second Circuit	4/4/2003	55	Yes	No	Yes

Tables 5.1 and 5.2 show some similarities and some differences in the precedents (also referred to as parent cases). Among the terrorism parent cases, approximately 79 percent of the decisions were unanimous compared to seventy-seven for the drug parent cases. Of the terrorism parent case only one case (approximately 3 percent) is an *en banc* decision while approximately 15 percent of the parent cases in the drug precedent are *en banc* decisions. Most of the decisions in both data sets favor the government, although the percentage of terrorism cases that favor the government are higher at 93 percent for the terrorism parent cases and seventy-seven for the drug parent cases.

Table 5.3 provides a summary of some of information about the progeny used in this study. The data sets are similar in the percentage of unanimous decisions, *en banc* decisions, and concurring opinions. Interestingly, both data sets have the same percentage of non-unanimous decisions and concurring opinions. Judges in this study wrote dissenting and concurring opinions in the same percentage of cases. The progeny citing terrorism precedents are more likely to treat the precedents favorably with 86 percent of the progeny treating the precedent positively compared to seventy-six for the progeny citing drug precedents. The progeny that cite terrorism precedents are also more

likely to favor the government with 87 percent of the cases favoring the government while 76 percent of the decisions in cases that cite drug precedents favoring the government. Cases that cite terrorism precedents are more likely to cite a precedent from their own circuit compared to cases that cite drug precedents at 63 percent compared to 54 percent. Another difference concerns the progeny from state courts. State courts make up a larger percentage of the drug case data set than the terrorism data set at 17 percent to 6 percent. Also, the state courts are more likely to cite a precedent from the circuit they are located in when citing a drug precedent compared to state cases that cite terrorism precedents at 41 percent to 24 percent.

Table 5.3: Progeny Summary

	Drug	Terrorism
Positively Treat Precedent	76%	86%
Pro-Government Decisions	76%	87%
Citations Inside Circuit	54%	63%
Unanimous Decisions	92%	94%
State Court	17%	6%
En Banc	5%	4%
Concurring Opinion	8%	6%
Government Appellant	11%	8%
Terrorism Cases	0.30%	14%
Federal Court of Appeals Decisions	42%	47%
State Court Progeny that Cite from Own Circuit	41%	24%

The parent cases (precedents) used in this research are all from the federal circuit courts of appeals. There are thirteen federal circuits and the circuit court is the highest level of the judiciary for each circuit. The norm of vertical *stare decisis* implies that the precedents from the highest court in the circuit should control cases within the circuit. The norm of horizontal *stare decisis* means that subsequent cases that reach the circuit courts should look to previous decisions of the same court and follow those decisions. The judiciary in the United States is made up of both federal and state systems. A

precedent from a circuit court can be cited by judges sitting in parallel courts (other circuits and on state courts).[25]

Table 5.4: Progeny: Citing Courts, by Issue Area

Court	*Terrorism*	*Drug*
Federal Circuit Courts	**213 (47%)**	**143 (42%)**
Federal District Courts	**211 (47%)**	**136 (40%)**
State Court	**25 (6%)**	**59 (17%)**
Total	**449 (100%)**	**338 (100%)**

Table 5.4 shows where the precedents from the federal appellate courts were used. Citations to precedents created by the federal circuit courts were more frequent in other federal courts than by state courts. State courts were more likely to cite a precedent from a drug case than to cite a precedent from a terrorism case with state courts making up 17 percent of the cases that cite the federal drug case precedent compared to just 6 percent of state court cases in the terrorism case data set. Since the "parent" precedents are from the federal court system, it would be expected that the federal courts would make up a majority of the citing courts in the data set. Most terrorism prosecutions occur at the federal level as opposed to drug cases which are common in state court so it would be expected that state courts are represented more in the drug court data set. It is important to note that even though state courts represent a different level of the judiciary and the precedents from the federal circuits are only binding on them when they pertain to federal law, state courts were persuaded to cite these precedents from the federal courts. In both issue areas the precedents were cited in federal district courts and in federal circuit courts

[25] Chi-squared statistics are presented when the data comes from the same data set. When no chi-squared statistic is presented, small differences in statistics may not be significant.

at similar levels with federal circuit courts represented slightly more than federal district courts in both issues areas.

Table 5.5: Usage of Precedents Inside & Outside Circuit for Drug Case Dataset

	Federal Circuit Courts	Federal District Courts	State Courts	Total
Inside Circuit	88 62%	95 70%	0 0%	183 54%
Outside Circuit	55 38%	41 30%	59 100%	155 46%
Total	143 100%	136 100%	59 100%	338 100%

Table 5.6: Usage of Precedents Inside & Outside Circuit for Terrorism Case Dataset

	Federal Circuit Courts	Federal District Courts	State Courts	Total
Inside Circuit	149 70%	133 63%	0 0%	282 63%
Outside Circuit	64 30%	78 37%	25 100%	167 37%
Total	213 100%	211 100%	25 100%	449 100%

Tables 5.5 and 5.6 show the usage of precedents inside and outside the circuit for each data set. Overall, precedents are more likely to be used inside their own circuit than outside for both issue areas. Terrorism precedents are more likely to be used inside their own circuit than drug court precedents, but this is partly because precedents from drug cases were used in state courts more frequently than precedents from terrorism cases. If the citations to precedent from the data set for state court cases are removed, the overall rates of citation inside and outside the circuit are almost equal. Among the progeny terrorism cases, 67 percent of the citations were by courts within the circuit compared to 66 percent of the drug case progeny when state court cases are removed from the data sets. It is logical that precedents from the circuit courts of appeals would be cited more

often in their own circuit because they are binding precedent inside the circuit, but only persuasive precedent outside the circuit.

Citation to a parent case is only the first step in the evaluation of judicial treatment of precedent. Another important aspect is how the precedents are treated. Precedents assist judges in making a decision by providing the judge with an example of how a past dispute in a similar area was resolved. Precedents can be treated positively by issuing a ruling following the same logic as the precedent or the precedent can be treated negatively where the logic of the precedent is not followed. Shepard's Citations reports how precedents are treated using the terms "followed," "distinguished," "limited," "criticized," "questioned," and "overruled". The notations from Shepard's can be divided into positive and negative treatment with "followed" being positive and "distinguished," "limited," "criticized," "questioned," and "overruled" indicating the precedent was treated negatively.

Table 5.7: Treatment of Precedent by Court for Drug Case Data Set

	Federal Circuit Courts	Federal District Courts	State Courts	Total
Positive	100 70%	112 82%	46 78%	258 76%
Negative	43 30%	24 18%	13 22%	80 24%
Total	143 100%	136 100%	59 100%	338 100%

$X^2(1,n=338)=6.060$ $p=0.048$

Table 5.8: Treatment of Precedent by Court for Terrorism Case Data Set

	Federal Circuit Courts	Federal District Courts	State Courts	Total
Positive	180 85%	182 86%	24 96%	386 86%
Negative	33 15%	29 14%	1 4%	63 14%
Total	213 100%	211 100%	25 100%	449 100%

$X^2(1,n=449)=2.487$ $p=0.290$

Tables 5.7 and 5.8 show the treatment of precedent sorted by different court levels. Both data sets show that precedents from the federal courts of appeals are generally treated positively by all levels of the court system. The terrorism data set has higher levels of positive treatment in each court level compared to the treatment of precedents by the drug cases. It is particularly pronounced in the treatment of precedent by state courts that treat precedents positively 96 percent of the time compared to only 78 percent of the time in the drug cases. In cases that cite drug precedents, judges sitting on the federal circuit courts of appeals were more likely to negatively treat precedent compared to judges in federal district courts. Judges citing drug precedents from federal circuit courts are more likely to treat a precedent negatively than a federal district court judge. This is logical and supports the idea of vertical *stare decisis*.

The state court system operates in parallel with the federal system. The separate nature of the state and federal judicial systems requires "federal judges to follow state interpretations of state law and to respect…state judges' interpretations of federal statutes and the Constitution" (Murphy et al. 2006, 92). Most federal court decisions are persuasive precedent in the state court system, so the impact of federal circuit court of appeals precedent is likely to be different in state courts than in federal courts. Terrorism precedents were treated negatively in state court only 4 percent of the time (one case) compared to 22 percent of the time (thirteen cases) for drug precedents. While state courts frequently consider litigation pertaining to drug offenses, most terrorism prosecutions occur at the federal level. This likely explains the different citation rates and treatment. State courts likely cite drug precedents more often than terrorism precedents because drug precedents involve issues that are more common in state courts than terrorism precedents. The only instance in the data set where a state court negatively treated a terrorism precedent involved applying *United States v. Nichols* (1999) to a theft case concerning the requirements of restitution to a victim (*State v. White 2004*). State courts are more likely to cite a drug precedent, but they are also more likely to positively treat a precedent from a terrorism case.

The twenty-four state cases that positively treat terrorism precedents from the federal circuit courts of appeals cover a wide variety of issue areas. Courts apply precedents from terrorism prosecutions in a variety of issues areas such as *Miranda*, search and seizure, *voire dire*, confrontation clause, jury misconduct, sentencing and others. The more common thread is that most of the state cases involve serious cases. Fourteen of the cases involve some type of person crime case such as murder, assault or

sex crimes. A smaller number of cases (four) dealt with drug crimes, three with property crimes, and two with civil issues.

State court cases cited drug case precedents primary for search and seizure issues. Of the fifty-nine times that a state court cited a federal circuit court of appeals drug case as a precedent, forty-six of the citations were as a precedent for an issue of search and seizure. The other issue areas where a state court cited a federal drug precedent were *Miranda* (seven times), inspection of discovery material by a judge (twice), certification of class in a civil case (twice), a challenge under *Batson v. Kentucky* (once), and ineffective assistance of counsel (once). State courts cited federal drug precedents to apply them to state drug cases with with thirty-five of the fifty-nine state cases applying the precedent to a drug case. Compared to the cases that cite terrorism precedents, the state cases that cited federal drug precedents were more likely to apply the precedent to a similar state drug case examining a similar issue area. Terrorism precedents were used in a wider variety of cases and issue areas when cited by a state court and terrorism precedents were used more frequently in persons crime cases.

Table 5.9 and 5.10 list the state court progeny cases from each data set and how the progeny treated the parent case they cited. The tables also list the circuit the state court is located in and whether the state court was citing a federal case from within its own circuit or outside of its circuit. State court progeny in drug cases, cited precedents from a different circuit 59 percent of the time compared to progeny in terrorism cases which cited precedents from a different circuit 76 percent of the time. State courts are more likely to positively treat a terrorism precedent and are also more likely to cite a precedent from a different circuit.

While federal courts are more likely to cite a precedent from their own circuit than a precedent from outside their circuit, the opposite is true for state courts. State courts are more likely to cite a precedent from a federal court located outside their circuit. When a state court cites a precedent from a terrorism case, the state court is likely to treat the precedent positively and to cite a precedent from a circuit outside of its jurisdiction. This is true for state courts that cite precedents from drug cases as well, but the effect is more pronounced in cases that cite terrorism precedents. From a legal model explanation, this could mean that judges in state courts find a similar issue that has already been addressed by federal judge and applies the legal reasoning from the federal case. An attitudinal model explanation would indicate that a judge from a state court looks at other decisions for a precedent that supports the judge's desired outcome. If the attitudinal model were correct, it would be expected that the citation rates and treatment between the two data sets would be similar. Case law from drug cases is more developed compared to case law from terrorism cases. Terrorism cases are more likely to involve novel issues. The legal model explanation that state courts are citing a federal court decision because they are faced with a similar issue and are applying the legal reasoning from the federal court decision better explains the different citation pattern and treatment by state court judges. This is an indication that the reason state courts cite a precedent from a federal court is because the state court is faced with a similar legal issue.

Table 5.9: State Court Progeny Citing Drug Precedents

Progeny	Parent	Parent Circuit	Progeny Court	Progeny Circuit	Progeny Circuit Different from Parent	Treatment
Dowty v. State	Horton v. Goose Creek School	5	Supreme Court Of Arkansas	8	Yes	Positive
Glassell v. Ellis	Horton v. Goose Creek School	5	Court Of Appeals Of Texas, Sixth District, Texarkana	5	No	Positive
People v. Fondia	Horton v. Goose Creek School	5	Appellate Court Of Illinois, Fourth District	7	Yes	Negative
Forsyth v. Lake LBJ Inv. Corp.	Horton v. Goose Creek School	5	Court Of Appeals Of Texas, Third District, Austin	5	No	Negative
People v. Gangler	Horton v. Goose Creek School	5	Supreme Court Of New York, Appellate Division, Fourth Department	2	Yes	Negative
State v. Sconsa	United States v. Andrus	7	Supreme Court Of New Hampshire	1	Yes	Positive
State v. Robles	United States v. Andrus	7	Court Of Appeals Of Arizona, Division Two, Department A	9	Yes	Positive

State v. Acinelli	United States v. Andrus	7	Court Of Appeals Of Arizona, Division One, Department B	9	Yes	Positive
State v. Cavins	United States v. Bengivenga	5	Court Of Appeals Of Iowa	8	Yes	Positive
People v. Mumford	United States v. Bengivenga	5	Court Of Appeals Of Colorado, Division Four	10	Yes	Positive
Garrison v. Commonwealth	United States v. Bengivenga	5	Court Of Appeals Of Virginia	4	Yes	Positive
Rodriguez v. State	United States v. Bengivenga	5	Court Of Appeals Of Texas, Third District, Austin	5	No	Positive
Martinez v. State	United States v. Bengivenga	5	Court Of Appeals Of Texas, Fourth District, San Antonio	5	No	Positive
State v. Folsom	United States v. Bengivenga	5	Supreme Court Of Georgia	11	Yes	Positive
State v. Jones	United States v. Berry	5	Court Of Criminal Appeals Of Tennessee, At Nashville	6	Yes	Positive
People v. Ramirez	United States v. Castillo	9	Court Of Appeal Of California, Second Appellate District, Division Seven	9	No	Positive

Brand v. State	United States v. Castillo	9	Court Of Appeals Of Alaska	9	No	Negative
People v. Santos	United States v. Castillo	9	Supreme Court Of Guam	9	No	Positive
McDonald v. State	United States v. Castillo	9	Supreme Court Of Delaware	3	Yes	Positive
State v. Ressler	United States v. La France	1	Supreme Court Of North Dakota	8	Yes	Negative
State v. Waz	United States v. La France	1	Supreme Court Of Connecticut	2	Yes	Positive
Commonwealth v. Rivera	United States v. La France	1	Superior Court Of Massachusetts, At Bristol	1	No	Positive
People v. Shapiro	United States v. La France	1	Appellate Court Of Illinois, Fourth District	7	Yes	Positive
Commonwealth v. Kaupp	United States v. La France	1	Supreme Judicial Court Of Massachusetts	1	No	Positive
Lindo v. State	United States v. La France	1	Court Of Appeal Of Florida, Fourth District	11	Yes	Positive
State V. Howard	United States v. Lambert	6	Court Of Appeals Of Ohio, Eighth Appellate District, Cuyahoga County	6	No	Positive
State v. Santiago	United States v. Lambert	6	Supreme Court Of New Mexico	10	Yes	Positive

State v. Enyart	United States v. Sangineto-Miranda	6	Court Of Appeals Of Ohio, Tenth Appellate District, Franklin County	6	No	Positive
State v. Harris	United States v. Sangineto-Miranda	6	Court Of Appeals Of Wisconsin	7	Yes	Positive
People v. Bennett	United States v. Sangineto-Miranda	6	Supreme Court Of California	9	Yes	Negative
People v. Whitfield	United States v. Sangineto-Miranda	6	Court Of Appeal Of California, Fifth Appellate District	9	Yes	Positive
State v. Molina	United States v. Sangineto-Miranda	6	Court Of Appeals Of Ohio, Eighth Appellate District, Cuyahoga County	6	No	Positive
State v. Holt	United States v. Sangineto-Miranda	6	Court Of Appeals Of Ohio, Third Appellate District, Marion County	6	No	Positive
Woodson v. Porter Brown Limestone Co.	United States v. Sangineto-Miranda	6	Supreme Court Of Tennessee, At Nashville	6	No	Negative

Lee v. State	United States v. Silvestri	1	Court Of Special Appeals Of Maryland	4	Yes	Positive
State v. Barkmeyer	United States v. Silvestri	1	Supreme Court Of Rhode Island	1	No	Positive
People v. Brzezinski	United States v. Silvestri	1	Court Of Appeals Of Michigan	6	Yes	Positive
State v. Joyce	United States v. Silvestri	1	Supreme Court Of Connecticut	2	Yes	Negative
State v. Nadeau	United States v. Silvestri	1	Supreme Judicial Court Of Maine	1	No	Positive
People v. Stevens	United States v. Silvestri	1	Supreme Court Of Michigan	6	Yes	Positive
State v. Warsaw	United States v. Stone	10	Court Of Appeals Of New Mexico	10	No	Positive
Fitzgerald v. State	United States v. Stone	10	Court Of Special Appeals Of Maryland	4	Yes	Positive
State v. Logan	United States v. Stone	10	Court Of Appeals Of Missouri, Western District	8	Yes	Positive
Cruz v. State	United States v. Stone	10	Court Of Special Appeals Of Maryland	4	Yes	Positive
State v. Freel	United States v. Stone	10	Court Of Appeals Of Kansas	10	No	Positive

State v. Napier	United States v. Stone	10	Court Of Appeals Of Ohio, Ninth Appellate District, Medina County	6	Yes	Positive
Feeney v. State	United States v. Stone	10	Supreme Court Of Wyoming	10	No	Positive
People v. Malloy	United States v. Vasey	9	Court Of Appeals Of Colorado, Division One	10	Yes	Negative
State v. Cartwright	United States v. Vasey	9	Court Of Appeals Of Washington, Division One	9	No	Negative
State v. Fernon	United States v. Vasey	9	Court Of Special Appeals Of Maryland	4	Yes	Negative
State v. Kapple	United States v. Vasey	9	Court Of Appeals Of Washington, Division Two	9	No	Negative
Williams v. State	United States v. Vasey	9	Court Of Appeals Of Maryland	4	Yes	Positive
State v. Adams	United States v. Vasey	9	Nebraska Court Of Appeals	8	Yes	Negative
State v. Martinez	United States v. Walther	9	Court Of Appeals Of Arizona, Division Two, Department A	9	No	Positive
State v. Butler	United States v. Walther	9	Court Of Appeal Of Florida, First District	11	Yes	Positive

State v. Kahoonei	United States v. Walther	9	Intermediate Court Of Appeals Of Hawaii	9	No	Positive
State v. Staggs	United States v. Walther	9	Court Of Criminal Appeals Of Tennessee, At Nashville	6	Yes	Positive
State v. Weinstein	United States v. Walther	9	Court Of Appeals Of Arizona, Division Two, Department B	9	No	Positive
State v. Ellingsworth	United States v. Walther	9	Court Of Appeals Of Utah	10	Yes	Positive

Table 5.10: State Court Progeny Citing Terrorism Precedents

Progeny	Parent	Parent Circuit	Progeny Court	Progeny Circuit	Progeny Circuit Different from Parent	Treatment
State v. Bozung	In re Terrorist Bombings	2	Supreme Court Of Utah	10	Yes	Positive
Donal Jenkins v Florida	United States v. Abdi	6	Supreme Court Of Florida	11	Yes	Positive
Colorado v Gomez-Garcia	United States v. Abu Ali	4	Court Of Appeals Of Colorado, Division Seven	10	Yes	Positive
Commonwealth v. Kennedy	United States v. Cleaver	10	Common Pleas Court Of Philadelphia County, Pennsylvania, Criminal Trial Division	3	Yes	Positive
State v. Unga	United States v. Dowell	10	Supreme Court Of Washington	9	Yes	Positive
State v. Miller	United States v. Graham	6	Court Of Appeals Of Ohio, Fourth Appellate District, Washington County	6	No	Positive
People v. Williams	United States v. Graham	6	Supreme Court Of Michigan	6	No	Positive
People of the Virgin Islands v. Rodriguez	United States v. Hammoud	4	Supreme Court Of The Virgin Islands	3	Yes	Positive
Pannell v. State	United States v.	11	Court Of Appeals Of	5	Yes	Positive

	Herrera		Mississippi			
State v. Watt	United States v. Khan	4	Supreme Court Of Washington	9	Yes	Positive
Wiley v. State	United States v. McVeigh	10	Court Of Criminal Appeals Of Texas	5	Yes	Positive
Farm Bureau Mut. Ins. Co. v. Foote	United States v. McVeigh	10	Supreme Court Of Arkansas	8	Yes	Positive
Butler v. State	United States v. McVeigh	10	Supreme Court Of Arkansas	8	Yes	Positive
People v. Dunlap	United States v. McVeigh	10	Supreme Court Of Colorado	10	No	Positive
State v. Colon	United States v. McVeigh	10	Supreme Court Of Connecticut	2	Yes	Positive
State v. Ross	United States v. McVeigh	10	Supreme Court Of Connecticut	2	Yes	Positive
Harlow v. State	United States v. McVeigh	10	Supreme Court Of Wyoming	10	No	Positive
Eaton v. State	United States v. McVeigh	10	Supreme Court Of Wyoming	10	No	Positive
Commonwealth v. Pelletier	United States v. Nettles	7	Appeals Court Of Massachusetts	1	Yes	Positive
State v. Martin	United States v. Nettles	7	Court Of Appeals Of Arizona, Division One, Department D	9	Yes	Positive
Gasparotto v. Gallagher Power Fence, Inc.	United States v. Nichols	10	Court Of Appeals Of Texas, Third District, Austin	5	Yes	Positive

State v. White	United States v. Nichols	10	Court Of Criminal Appeals Of Tennessee, At Jackson	6	Yes	Negative
Lawson v. State	United States v. Nichols	10	Supreme Court Of Wyoming	10	No	Positive
Colorado v Gomez-Garcia	United States v. Yousef	2	Court Of Appeals Of Colorado, Division Seven	10	Yes	Positive
State v. Mann	United States v. Yousef	2	Superior Court Of New Hampshire, Hillsborough County, Southern District	1	Yes	Positive

In addition to the treatment of precedent by the different court levels, examining how precedents are treated inside and outside a circuit can be helpful. It would be expected for precedents to be treated more positively inside the circuit rather than outside the circuit. Of course, since the precedents are from the federal circuit courts, all of the precedents are from outside the state court system so treatment inside the circuit and outside the circuit for comparison only applies to federal cases.

Table 5.11: Treatment of Precedent Inside and Outside the Circuit by Federal Circuit Courts in the Drug Case Data Set

	Inside Circuit	Outside Circuit	Total
Positive	69 78%	31 56%	100 70%
Negative	19 22%	24 44%	43 30%
Total	133 100%	78 100%	211 100%

$X^2(1,n=213)=7.823$ $p=0.005$

Table 5.12: Treatment of Precedent Inside and Outside the Circuit by Federal District Courts in the Drug Case Data Set

	Inside Circuit	Outside Circuit	Total
Positive	88 93%	24 59%	112 82%
Negative	7 7%	17 41%	24 18%
Total	95 100%	41 100%	136 100%

$X^2(1,n=213)=22.909$ $p=0.000$

Table 5.13: Treatment of Precedent Inside and Outside the Circuit by the Federal Circuit Courts in the Terrorism Case Data Set

	Inside Circuit	Outside Circuit	Total
Positive	133 89%	47 73%	180 85%
Negative	16 11%	17 27%	33 15%
Total	149 100%	64 100%	213 100%

$X^2(1,n=213)=2.487$ $p=0.003$

Table 5.14: Treatment of Precedent Inside and Outside the Circuit by Federal District Courts in the Terrorism Case Data Set

	Inside Circuit	Outside Circuit	Total
Positive	112 84%	70 90%	182 86%
Negative	21 16%	8 10%	29 14%
Total	133 100%	78 100%	211 100%

$X^2(1,n=213)=1.270$ $p=0.260$

When the treatment of precedent inside and outside the circuit is examined, the data show that precedents from inside the circuit are usually treated more favorably than precedents from outside the circuit. This is true for both federal circuit courts and for federal district courts in the drug precedent data set. Federal circuit courts treat terrorism precedents from inside their circuit more favorably than precedents from outside the circuit, but federal district courts reverse this trend. Federal district courts using drug

case precedents have the highest rate of positive treatment of precedent which is a result that would be expected since they are following precedent from their circuit in what are likely routine cases. What is unexpected is that federal district courts when using terrorism precedents tend to treat precedents from outside the circuit more favorably than precedents from inside the circuit. This may be again because terrorism law is unsettled causing federal district courts to look outside their circuit for precedent. Overall, federal district courts, when looking at terrorism precedents, are the most likely to treat a precedent favorably; however, when a precedent is used from outside the circuit, it is more likely to be treated favorably than a precedent from inside the circuit. Among cases that cite terrorism precedents, federal district courts overall treat precedents favorably 86 percent of the time, but if the precedent is from outside the circuit, the precedents are treated positively 90 percent of the time.

In comparing the terrorism progeny and the drug progeny, there are a few differences. The progeny from terrorism cases are more likely to be treated positively overall. The difference is more pronounced when comparing citations to precedent outside the circuit. The drug precedents are treated favorably outside the circuit less than 60 percent of the time at both the district and circuit court levels while terrorism precedents are treated positively outside the circuit at over 70 percent at the circuit court level and over 90 percent at the district court level. Precedents from both data sets are treated positively the majority of the time. The main difference between the data sets is increased likelihood that a terrorism precedent will be treated positively outside the circuit compared to a drug precedent.

This data set provides an opportunity to examine how parallel courts treat precedents from outside their courts. Previous research considered "the very real need for information in the face of high levels of uncertainty" as a reason for the use of citations from a parallel court (Caldeira 1985, 178). While state courts were more likely to use a drug precedent rather than a terrorism precedent, the state courts were more likely to positively treat a terrorism precedent. As drug case law has been litigated more than case law concerning terrorism prosecutions, the difference is likely due to the issue areas. The concept of uncertainty in a less litigated area of law may help to explain the difference in how precedents from each issue area are treated. When a judge is faced with a novel issue similar to what is involved in the prosecution of terrorism incidents, the judge may look for a case involving a similar issue and apply the legal reasoning from the precedent from outside the jurisdiction.

These statistics are an indication of the influence of vertical *stare decisis* compared to horizontal *stare decisis*. In the drug court data set where the law is likely more settled, the greatest deference to precedent is from the same circuit courts of appeals to their own precedent from their own circuit. This may be an indication that lower courts are hesitant to criticize a higher court that can reverse their decisions. The data show that federal district courts commonly cite precedents from outside their circuit in drug cases with an increased willingness to negatively treat those precedents compared to precedents from inside the circuit. Cross, Spriggs, Wahlbeck, and Johnson (2010) noted that even when a precedent is treated negatively it is an indication that the court is acknowledging the importance of the precedent simply by discussing the precedent in the decision (2010). While federal courts may be more likely to negatively treat a precedent

from outside its circuit, that precedent is still exerting some influence by the mere fact that the precedent was cited.

Precedents in the terrorism data set are treated positively outside their own circuit at higher rates than in the drug case data set. Not only are courts looking outside their circuit when dealing with a novel issue, but the courts are following the precedent from outside the circuit. This is an indication that the earlier a precedent is created, the more likely it is to be followed and to exert influence on the development of the law. This observation would point to the importance of the decisions in new areas of law that those precedents tend to be more influential than precedents that come later.

These tables also suggest that the influence of terrorism precedents is more widespread than the influence of precedents from drug cases. Terrorism precedents are influential inside their circuit, outside their circuit, and in state courts. Tables 5.7 and 5.8 show that terrorism precedents are more likely to be treated positively across all courts. Precedents from both data sets are likely to be treated positively, but precedents from terrorism cases are more influential across different levels of courts as well as inside and outside of its circuit.

Understanding the influence of precedents on the development of the law should also take into account the age of the parent case. When a precedent is created, it is helpful to examine how long it remains active and likely be influential in a court case. Figures 5.1 and 5.2 show the amount of time that elapsed until a precedent was cited in each data set. The graphs for the two data sets look very different. Precedents from drug cases are used more frequently as they get older peaking in citation close to twenty years after the precedent was first established.

Figure 5.1: Use of Precedent over Time – Drug Case Data Set

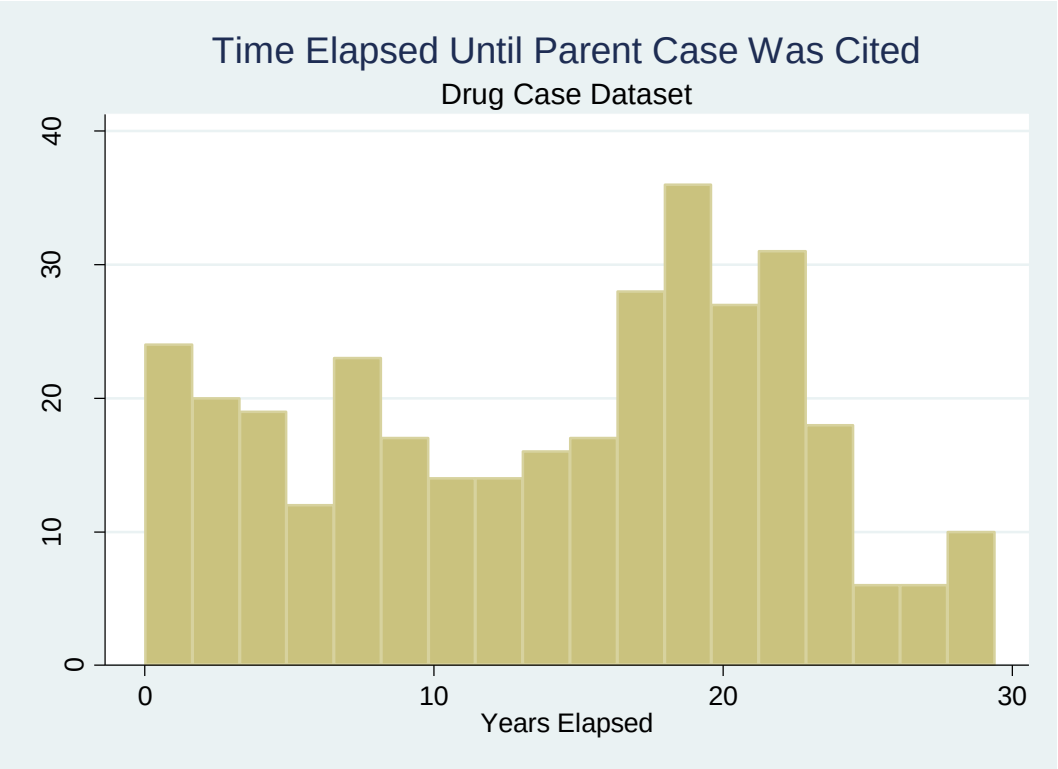
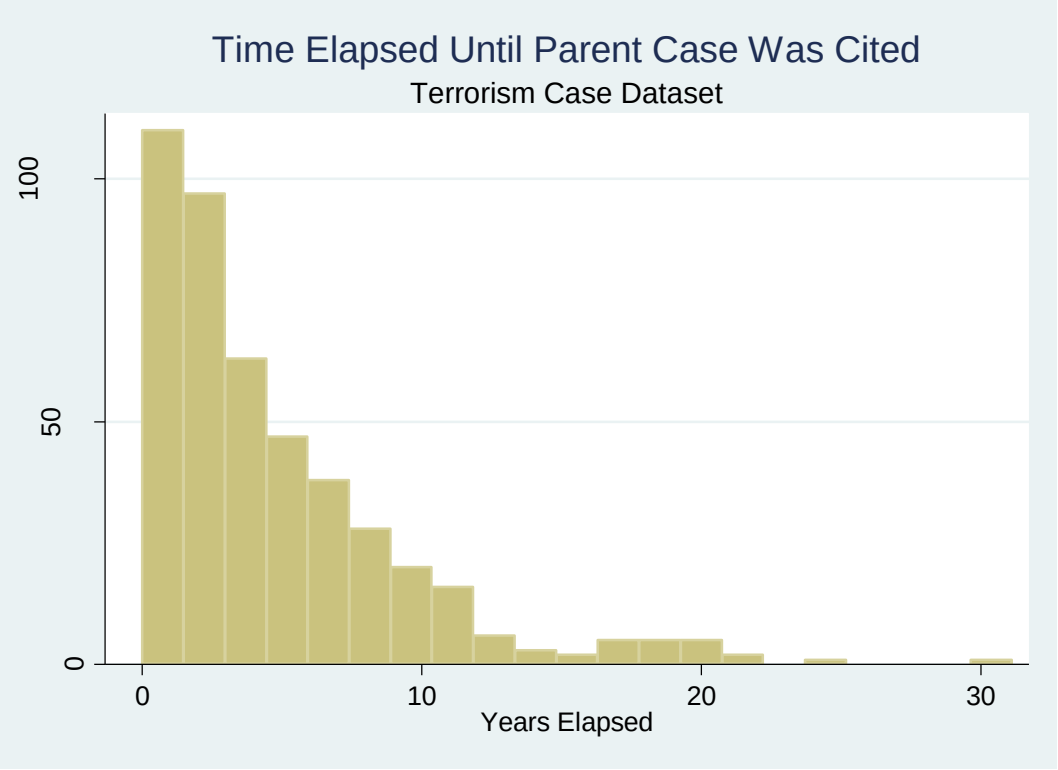


Figure 5.2 shows similar information for cases in the terrorism data set. Those precedents tend to be cited soon after the precedent was established, but greatly decrease over time. Part of this difference may be due to the ongoing prosecution of drug crimes compared to the recent rise in concern for terrorism prosecutions as compared to drug cases.

Figure 5.2: Use of Precedent over Time – Terrorism Case Data Set



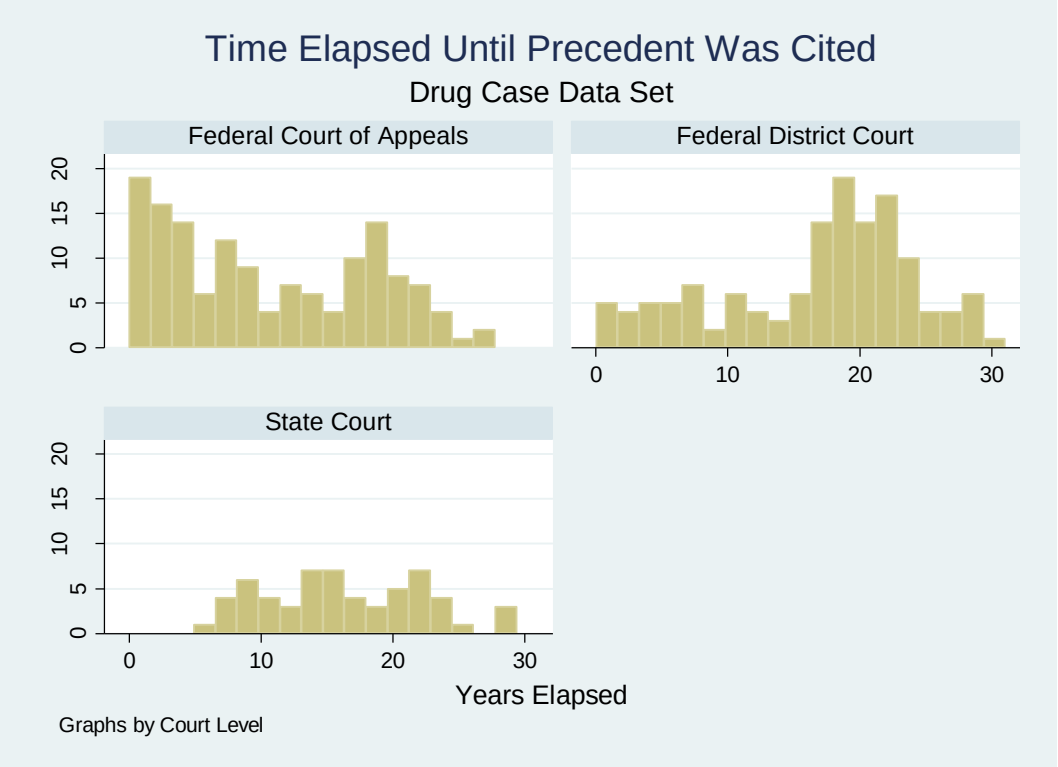
Another important difference between the two figures is that the terrorism cases are cited at much higher rates initially than the precedents from the drug case data set. While the use of precedents in drug cases peaks around twenty years after the decision, the citation rates are well below that of the terrorism precedents in the first years after the precedent was decided. Again, this points to the importance and influence of precedents in novel areas of law. The first precedents decided in an issue area exert more influence than subsequent precedents. The terrorism cases are cited in much greater numbers and are more likely to be treated positively shortly after the decision is announced.

Another helpful way to look at where and when precedents affect the development of the law is to compare the use of citations in each data set over time by court level. Figures 5.3 and 5.4 shows the use of citations over time at different court levels. The terrorism cases data set shows the same basic pattern of citations over time

regardless of court level while the citations to precedents from the drug case data set varies by court level. Again, the initial citation by both the federal circuit and district court levels to precedents from the terrorism data set are much greater than the citations from the federal district and circuit courts in the drug cases data set. State courts initially cite precedents from terrorism cases and then stop after a few years, while state court citations to precedents from drug cases do not start until several years after the precedent has been decided.

The use of citations to precedents from the drug cases data set is different from the terrorism data set. While they appear to continue to cite precedent over time, there is also a noticeable difference in how they are treated by different levels of the court system. Consistent with their function in establishing legal standards as new issues arise, federal circuit court use of the parent cases was more frequent in the early years of a newly established precedent. Over time, citation to the parent case slowly declined in the number of citations only to rise again around the twenty year mark. In contrast, federal district courts in drug cases cite precedents from the circuit courts in greater numbers over ten years after the parent case was decided. They do cite the precedent soon after it was created, but the number of citations increases around the twenty year mark and then begins to decrease. Parent cases decided by the federal circuits associated with the war on drugs were used in state court, but only after they had been established.

Figure 5.3: Use of Precedent over Time by Court – Drug Case Data Set

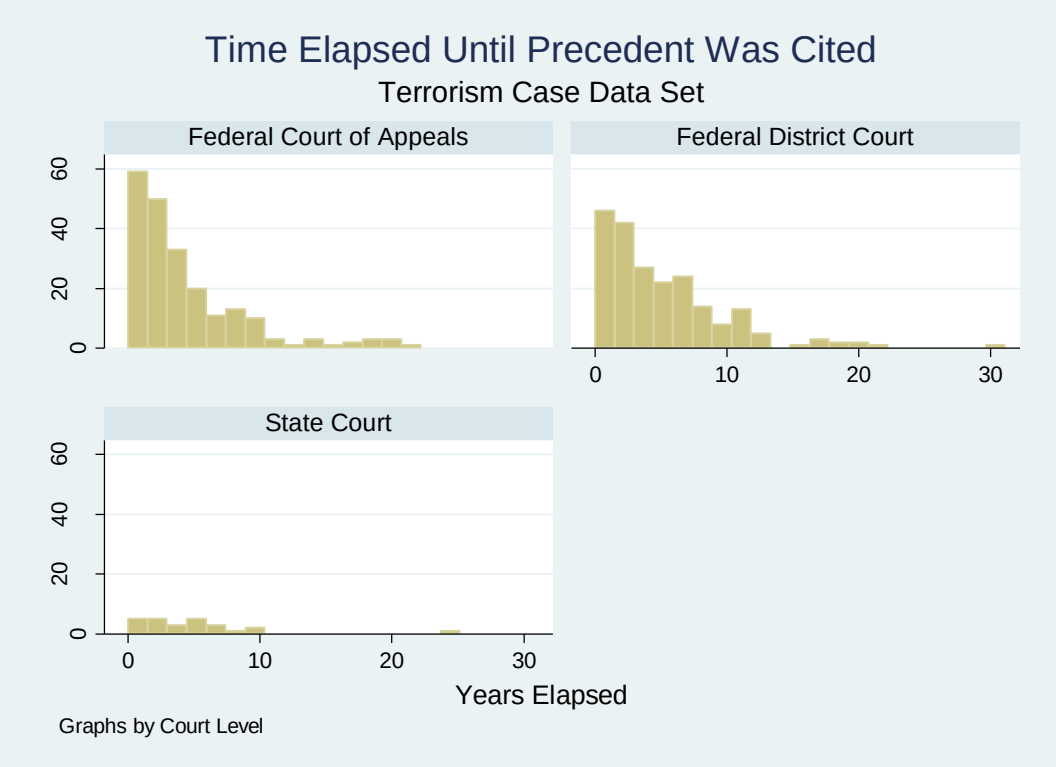


The diffusion of legal standards established by circuit courts in the parent terrorism cases exhibited a contrasting pattern. Given this novel area where federal jurisdiction ensures a prominent role in the federal courts, the use of precedent over time did not vary much by court. When a precedent is created at the federal circuit court level, it is likely to exert influence across different levels of the court system shortly after it is created and then wane over time. Select precedents in areas of law that are more established may increase in influence over time.

Hansford and Spriggs (2006) did not find a linear relationship between the citation of precedents and the influence of time. The increased use of a precedent over time is supported by the research of Glick (1992) and Klein (2002) who found that judges look to how other judges solved a problem and often use the same solution which means

citing the same precedents. As there are many precedents from drug cases, a select set of precedents become more commonly used as others cite them and so they build over time. Without precedents to choose from in terrorism cases, judges look to the only precedents that are available.

Figure 5.4: Use of Precedent over Time by Court – Terrorism Case Data Set



To understand the seriousness of the cases represented in the data set, it is helpful to know what types of cases are included in the data set. Figures 5.5 and 5.6 show the types of cases by the most serious charge that are involved in the data set.

Figure 5.5: Drug Progeny Cases by Offense

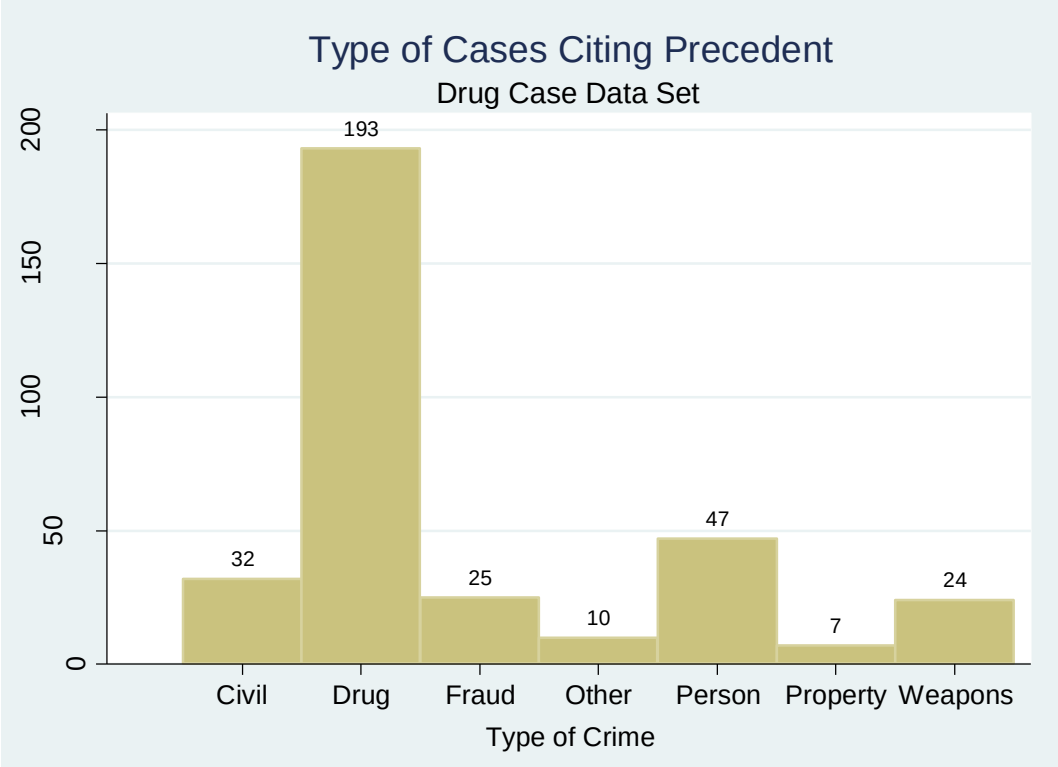
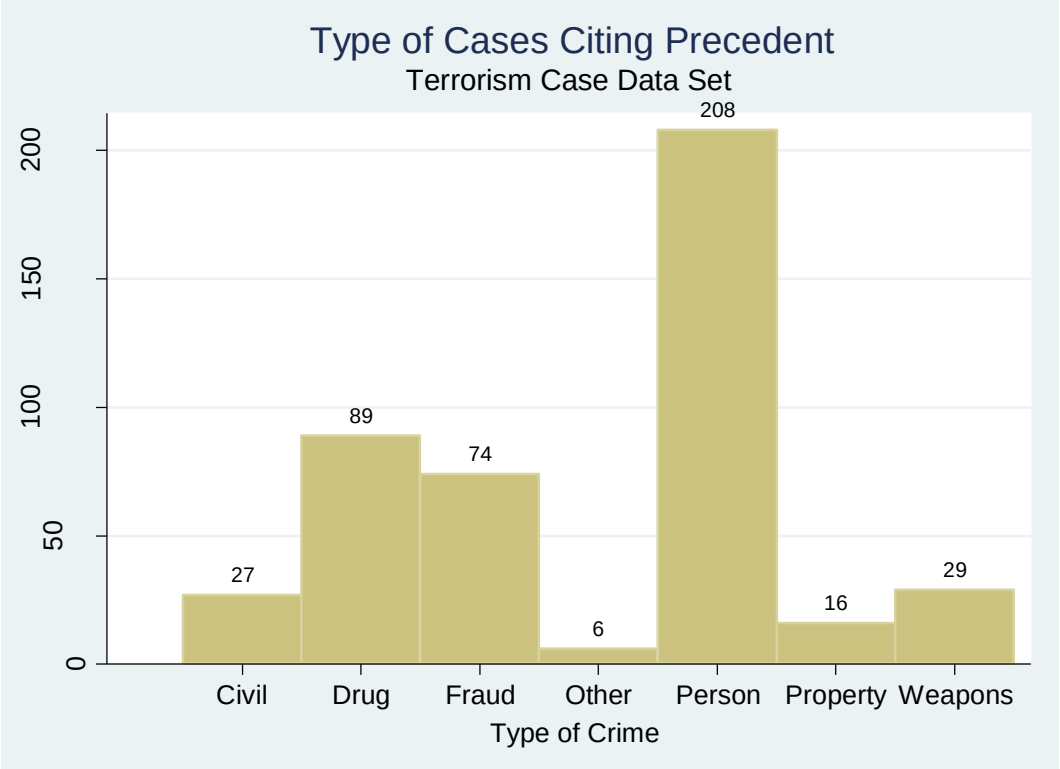


Figure 5.6: Terrorism Progeny by Offense



Precedents from drug cases are used most often in other drug cases whereas precedents from terrorism cases are used most often in crimes against persons cases. "Person crimes" are offenses involving violence against a person such as a murder, sex crime, robbery, or other type of assault (including 61 terrorism cases).

An examination of the progeny cases that cite terrorism and drug precedents offer some interesting insights. In novel issue areas, the earliest precedents exert the most influence. Precedents in terrorism cases are cited at rates much higher than drug case precedents in the first years after the precedent was created. Precedents from terrorism cases are more likely to be treated positively than precedents from drug cases in general and specifically they are more likely to be treated positively when cited outside of their circuit. Federal district courts citing drug precedents showed the highest rate of positive

treatment of precedent indicating that in an area of law that is well developed, precedents from the federal circuit courts are influential inside their own circuit.

In determining where precedents are likely to be influential, the answer depends on the issue area. For progeny cases that cite parent precedents associated with the war on drugs, precedents are likely to be influential inside their own federal circuit. Inside their own circuit, select precedents in drug cases became fixtures, being cited by progeny increasingly over time. Precedents established by decisions involving terrorism are likely to be influential both inside and outside of their circuit. Their influence is particularly strong in the first years after they are established and decreases over time. Overwhelmingly, the treatment of parent cases in both issue areas was positive, although this tendency was particularly pronounced in the use of terrorism precedents. This points to the importance of the first precedents established in an issue area and that they will exert the most influence. These figures also indicate that, while precedents from both issue areas favor the government, precedents from terrorism cases are more likely to favor the government. Since precedents from terrorism cases are cited a high levels shortly after they are created and favor the government, it is expected that these cases will pull the judiciary in a conservative direction. These expectations will be examined more systematically in the following chapter.

CHAPTER 6

MULTIVARIATE ANALYSIS

> …if conventional legal rules are adapted to deal with a terrorist threat, whether by relaxed standards for conviction, searches, the admissibility of evidence or otherwise, those adaptions will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law
>
> - Former Attorney General Michael Mukasey (2007)

As the criminal justice system is used to prosecute terrorist suspects, more cases will enter the judiciary. These cases will present unusual fact patterns such as the race against time to prevent a bomb from exploding in *United States v. Khalil* or unique issues such as the application of *Miranda* to the questioning of a suspect held incommunicado by another country in *United States v. Abu Ali* and *In re Terrorist Bombings*. As these cases make their way through the judicial system, they will become precedents. These precedents will be applied to common criminal procedure issues and influence the development of case law. There are few empirical studies on the effect of cases of security concern on the judiciary. One study predicted "that as long as the war on terror continues in a severity comparable to previous wars, we should see a sharp turn to the right in ordinary civil rights and liberties decisions…" (Epstein et al. 2005, 95). Chapter 2 examined the impact of precedents from terrorism cases on the development of case law concerning *Miranda*. The previous chapter provided a portrait of "parent" precedents and their progeny, highlighting where precedents are likely to be influential.

This chapter will look more broadly at the impact of precedents from terrorism cases to determine if the prosecution of terrorism cases pull the judiciary in a conservative direction.

Case law develops incrementally as precedents are interpreted and applied to new cases. Changes in society are reflected in the development of law as new fact patterns are addressed in the judiciary by applying precedents to an issue and creating new precedents. The "war on drugs" and the rise of crack cocaine in the 1980s introduced new issue areas and affected the development of law. Case law concerning the use of informants, consent searches, the good faith exception to the exclusionary rule, border searches, and the questioning of suspects were all altered by the "war on drugs" (Weisselberg 2008). The rise in the prosecution of terrorist suspects is also likely to influence the development of law in areas of criminal procedure. A study of the treatment of issues related to national security indicates that the judiciary shows greater deference in these cases than in normal criminal prosecutions (Sunstein 2008b). Judge Richard Posner explained, "judges, knowing little about the needs of national security, are unlikely to oppose their own judgment to that of the executive branch, which is responsible for the defense of the nation" (R. Posner 2006a, 9). If the judiciary is more likely to be deferential to the government in terrorism cases as they address issues related to criminal procedure, then trends in case outcomes will reflect a conservative, pro-government direction. In Chapter 2, the legal analysis suggested that precedents from terrorism cases in the area of confessions pulled the judiciary in a more conservative direction. The results of the statistical models used in this chapter indicate this can be

generalized more broadly as precedents from the prosecution of terrorism cases affect more than just *Miranda* cases.

To test the hypotheses outlined earlier, these models examine judicial treatment of leading "parent" precedents used in the prosecution of terrorism and drug cases. As described in earlier chapters, parent cases were shepardized to determine where the cases were cited and how these parent cases were treated by the progeny that cited them. A data set of the progeny were created including whether the outcome favored the government and whether the parent case was favorably or negatively treated. If the judiciary is pulled in a conservative, pro-government direction, the models should show that the parent cases are more likely to be treated positively when it favors the government to follow the precedent. If the parent cases are not moving the judiciary in a conservative direction, then the likelihood of treating a parent case positively should not be influenced by the government.

Chapter 5 presented statistics showing when a precedent is likely to be cited. As this research considers the effect of precedents on the judiciary over time it is important to consider whether precedents get stronger or weaker as time passes. The graphs from Chapter 5 show that terrorism precedents were cited frequently after a precedent was created and then decreasing as time passed. Precedents from drug cases were cited in greater numbers approximately twenty years after the precedent was created. This indicates that precedents in drug cases gain strength over time while precedents from terrorism cases lose strength over time although the relationship is not linear.

Hansford and Spriggs (2006) found that precedent vitality was important in determining how a case is treated when it is cited as a precedent. They found that the

more a precedent was treated positively the more likely it was to be followed. The results from Chapter 5 indicate that terrorism cases do not gain strength over time, but rather are cited much less frequently. Drug cases do appear gain strength over time although their use varies by court level. District courts appear to cite drug precedents in great number as time passes and this may be due to a precedent gaining strength as it is cited by other courts. The logit models will examine precedent vitality in both data sets to determine if precedents become stronger over time as they are treated positively by other courts.

Chapter 5 also examined where precedents were likely to be influential. Precedents from both terrorism cases and drug cases were treated positively the majority of the time. Terrorism precedents were cited more often inside their own circuit, but were more likely to be treated positively when cited outside the circuit. Drug precedents tended to be more influential inside their own circuit than outside, but the precedents were still treated positively the majority of the time whether cited inside or outside the circuit.

Chapter 4 discussed the methods used for this research and presented four hypotheses. After presenting the logit models, this chapter will discuss those four hypotheses. Tables 6.1, 6.2, 6.3, and 6.4 show the results from the logit models for treatment of precedent. Tables 6.3 and 6.4 include the control "Precedent Pro-Government" to control for whether the outcome of the precedent favored the government. This control is used to account for the possibility that the models are showing the influence of precedents that favor the government rather than the influence of precedents from terrorism or drug cases. The results are reported without this control in tables 6.1 and 6.2 and with this control in tables 6.3 and 6.4. The dependent variable

for this model is the positive or negative treatment of either a drug or terrorism precedent from the federal circuit courts of appeals. The variable for state government is not reported in the terrorism precedent data set because there was no variance in the variable. The variable was dropped from the data set because each time it cited the precedent it followed the precedent.[26] Table 6.5 presents the odd ratios for the variables from both data sets.

The logit models show coefficients and standard errors for a logit that are robust, clustered on the precedent, and clustered on the citing case. The unit of analysis for the data sets is treatment of precedent by a citing case. A logit model assumes the variables are not correlated. The variables in this model are likely correlated because they are from a set of precedent cases. The variables are likely also correlated based on the cases that cite the precedent as a case can cite more than one precedent. To control for this, the logit models are clustered on the precedent and on the citing case to produce standard errors that account for the correlation. The variables were checked for collinearity and a correlation matrix of the variables is presented in Appendix E.

[26] There is one state case that cites a terrorism precedent and treats it negatively. The ideology of the judge could not be determined, so it was not used in the logit models.

Table 6.1: Likelihood of Positive Treatment of Precedent – Drug Precedent

Variable	Robust	Clustered on Citing Case (Progeny)	Clustered on Precedent (Parent)
Pro Government	-.35	-.35	-.35
	(0.52)	(0.52)	(0.61)
Time Since Precedent (Days)	.01	.01	.01
	(0.01)	(0.01)	(0.01)
Time Since Precedent $(Days)^2$	-1.65	-1.65	-1.65
	(1.94)	(1.95)	(2.85)
Ideological Distance	-0.01	-0.01	-0.01
	(0.30)	(0.30)	(0.24)
Deference to Lower Court	0.30	0.30	0.30
	(0.51)	(0.51)	(0.50)
Government Appellant	-0.61	-0.61	-0.61
	(0.52)	(0.52)	(0.48)
Vitality	-0.01	-0.01	-0.01
	(0.02)	(0.02)	(0.02)
Parent Decision Unanimous	-0.33	-0.33	-0.33
	(0.74)	(0.74)	(0.27)
Parent Decision En Banc	0.92	0.92	0.92**
	(0.83)	(0.83)	(0.37)
Inside Circuit	1.32***	1.32***	1.32***
	(0.33)	(0.33)	(0.35)
State Court	0.86	0.86	0.86
	(0.55)	(0.55)	(0.55)
Constant	-0.17	-0.17	-0.17
	(0.99)	(0.99)	(0.72)
N	283	283	283
Log Likelihood	-137.756	-137.756	-137.756
Pseudo R^2	0.12	0.12	0.12
PRE	4.41%	4.41%	4.41%

*Significant at p<0.10 **Significant at p<0.05 ***Significant at p<0.01
Model predicts negative treatment of precedent correctly 19% of the time
Model predicts positive treatment of precedent correctly 95% of the time

Table 6.1 presents the results of the models estimating hypothesized effects for factors that affect the judicial treatment of "parent" precedents established as part of the war on drugs. The only statistically significant relationship (across all models) emerged for the variable "inside circuit." Parent cases were significantly more likely to be favorably cited when the progeny court was in the same circuit. The coefficient for the parent decision being *en banc* was significant when clustered on the parent case. That model indicated support precedents from *en banc* decisions being more likely to be treated positively, but this variable was not significant when the data was not clustered or clustered on the citations to precedent.

Table 6.2: Likelihood of Positive Treatment of Precedent – Terrorism Precedent

Variable	Robust	Clustered on Citing Case (Progeny)	Clustered on Precedent (Parent)
Pro-Government	1.61**	1.61**	1.61*
	(0.81)	(0.83)	(0.99)
Time Since Precedent (Days)	.01*	.01*	.01
	(0.01)	(0.01)	(0.01)
Time Since Precedent $(Days)^2$	-5.69**	-5.69**	-5.69*
	(2.55)	(2.59)	(3.41)
Ideological Distance	-0.25	-0.25	-0.25
	(0.32)	(0.32)	(0.33)
Deference to Lower Court	0.55	0.55	0.55
	(0.80)	(0.81)	(0.94)
Government Appellant	0.13	0.13	0.13
	(0.78)	(0.78)	(0.81)
Vitality	0.12	0.12	0.12
	(0.08)	(0.11)	(0.09)
Parent Decision Unanimous	-0.80*	-0.80*	-0.80**
	(0.44)	(0.45)	(0.33)
Parent Decision En Banc	-0.52	-0.52	-0.52**
	(0.64)	(0.64)	(0.26)
Inside Circuit	0.56*	0.56*	0.56*
	(0.31)	(0.31)	(0.33)
Constant	0.05	0.05	0.05
	(0.64)	(0.64)	(0.54)
N	404	404	404
Log Likelihood	-140.357	-140.357	-140.357
Pseudo R^2	0.16	0.16	0.16
PRE	3.45%	3.45%	3.45%

*Significant at p<0.10 **Significant at p<0.05 ***Significant at p<0.01

State Court dropped because it predicts perfectly

Model predicts negative treatment of precedent correctly 21% of the time

Model predicts positive treatment of precedent correctly 97% of the time

The results in Table 6.2 indicate several statistically significant effects on judicial treatment of parent precedents established as a result of the prosecution of terrorists. Pro-government outcomes contributed to the likelihood of a positive treatment. The estimates also suggest that age has a curvilinear effect, as time passed, the likelihood of a favorable citation increased. After reaching a peak, the passage of time significantly reduced the likelihood of a parent case being positively cited. The results also show unanimous decisions have a negative effect on the likelihood that a terrorism precedent will be treated positively. The coefficient for a parent decision being decided *en banc* was significant when clustered on the parent case (precedent), but not significant when the data was not clustered or clustered on the citing case (the progeny). The variable for progeny cases decided inside the same circuit as the precedents show that progeny cases that cite precedents from their circuit are more likely to treat the precedent positively.

Table 6.3: Likelihood of Positive Treatment of Precedent with Precedent Pro-Government Control – Drug Precedent

Variable	Robust	Clustered on Citing Case (Progeny)	Clustered on Precedent (Parent)
Pro-Government	-0.28	-0.28	-0.28
	(0.51)	(0.51)	(0.57)
Precedent Pro-Government	0.93**	0.93**	0.93**
	(0.38)	(0.38)	(0.36)
Time Since Precedent (Days)	.01	.01	.01
	(0.01)	(0.01)	(0.01)
Time Since Precedent $(Days)^2$	-1.13	-1.13	-1.13
	(2.01)	(2.02)	(2.86)
Ideological Distance	-0.08	-0.08	-0.08
	(0.31)	(0.31)	(0.24)
Deference to Lower Court	0.14	0.14	0.14
	(0.51)	(0.50)	(0.48)
Government Appellant	-0.62	-0.62	-0.62
	(0.52)	(0.52)	(0.51)
Vitality	-0.01	-0.01	-0.01
	(0.02)	(0.02)	(0.03)
Parent Decision Unanimous	-0.09	-0.09	-0.09
	(0.74)	(0.74)	(0.24)
Parent Decision En Banc	0.87	0.87	0.87**
	(0.83)	(0.83)	(0.37)
Inside Circuit	1.25***	1.25***	1.25***
	(0.34)	(0.34)	(0.35)
State	0.78	0.78	0.78
	(0.55)	(0.55)	(0.57)
Constant	-0.96	-0.96	-0.96
	(1.05)	(1.04)	(0.70)
N	283	283	283
Log Likelihood	-134.808	-134.808	-134.808
Pseudo R^2	0.14	0.14	0.14
PRE	4.35%	4.35%	4.35%

*Significant at p<0.10 **Significant at p<0.05 ***Significant at p<0.01
Model predicts negative treatment of precedent correctly 22% of the time
Model predicts positive treatment of precedent correctly 95% of the time

Table 6.3 shows the results of the models for variables affecting the treatment of precedents from drug cases.[27] These models are similar to the models reported in Table 6.1 except that the models in Table 6.3 include a control variable for the precedent decision favoring the government (precedent pro-government). Two variables are significant across all the models in Table 6.3. The coefficient for the variable indicating the precedent was decided in favor of the government is significant and positive across all the models. This is an indication that when the precedent favors the government, the citing court (the progeny) are more likely to positively treat the precedent. The other variable that is significant across all the models is the variable for "inside circuit" indicating that the citing court and the parent case are from the same circuit. Cases citing precedent from inside the circuit were more likely to positively treat the precedent.

[27] To examine the influence of cases where the policy of the progeny matches the policy of the precedent, another model was created which dropped the variables for pro-government (progeny) and precedent pro-government. These variables were replaced with a variable coded as one if both the precedent and the progeny were pro-government decisions. This variable was significant across all the models indicating that when the policy outcome of the precedent matches the policy outcome of the progeny, the precedent is more likely to be supported.

Table 6.4: Likelihood of Positive Treatment of Precedent with Precedent Pro-Government Control – Terrorism Precedent

Variable	Robust	Clustered on Citing Case (Progeny)	Clustered on Precedent (Parent)
Pro-Government	1.79**	1.79**	1.79*
	(0.81)	(0.83)	(1.01)
Precedent Pro-Government	1.31**	1.31**	1.31**
	(0.58)	(0.58)	(0.66)
Time Since Precedent (Days)	.01	.01	.01
	(0.01)	(0.01)	(0.01)
Time Since Precedent $(Days)^2$	-5.43**	-5.43**	-5.43
	(2.58)	(2.62)	(3.43)
Ideological Distance	-0.28	-0.28	-0.28
	(0.32)	(0.31)	(0.31)
Deference to Lower Court	0.43	0.43	0.43
	(0.80)	(0.81)	(0.96)
Government Appellant	0.20	0.20	0.20
	(0.78)	(0.78)	(0.81)
Vitality	0.12	0.12	0.12
	(0.09)	(0.11)	(0.09)
Parent Decision Unanimous	-0.63	-0.63	-0.63**
	(0.46)	(0.46)	(0.33)
Parent Decision En Banc	-0.48	-0.48	-0.48*
	(0.64)	(0.64)	(0.26)
Inside Circuit	0.49	0.49	0.49
	(0.32)	(0.32)	(0.36)
Constant	-1.22	-1.22	-1.22
	(0.88)	(0.90)	(0.93)
N	404	404	404
Log Likelihood	-138.189	-138.189	-138.189
Pseudo R^2	0.17	0.17	0.17
PRE	10.34%	10.34%	10.34%

*Significant at p<0.10 **Significant at p<0.05 ***Significant at p<0.01
State Court dropped because it predicts perfectly
Model predicts negative treatment of precedent correctly 21% of the time
Model predicts positive treatment of precedent correctly 98% of the time

Table 6.4 reports the results for factors affecting the likelihood of precedents from terrorism cases to be treated positively by cases that cite the precedent. This model includes a control variable for the parent case outcome to favor the government (precedent pro-government). The pro-government variable and precedent pro-government variable were significant across all the models. The variable for time squared was significant in two of the three models and the variables for the parent decision being unanimous and the parent decisions being *en banc* were both significant in one model.[28]

[28] A binomial regression model was also conducted. The results were similar to the results reported in the logit models. The results of the Negative Binomial Regression model are reported in Appendix D.

Table 6.5: Likelihood of Positive Treatment of Precedent with Precedent Pro-Government Control – Odds Ratios

Variable	Terrorism	Drug
Pro-Government	5.98**	0.75
Precedent Pro-Government	3.69**	1.31**
Time Since Precedent (Days)	1.00	1.00
Time Since Precedent $(Days)^2$	0.99**	1.00
Ideological Distance	0.75	0.92
Deference to Lower Court	1.54	1.15
Government Appellant	1.22	0.54
Vitality	1.12	0.99
Parent Decision Unanimous	0.53**	0.91
Parent Decision En Banc	0.61**	2.38**
Inside Circuit	1.63	3.51**
State	Omitted	2.18

** Variable is significant at $p<0.05$

Table 6.5 reports the odds ratios for the variables used in the two models. In cases that use a terrorism precedent, the odds of the precedent being treated positively increases by a factor of 5.98 if the outcome of the case favors the government. The odds

of the precedent being treated positively increases by a factor of 3.69 in the terrorism data set and by a factor of 1.31 if the outcome of the precedent favored the government. For each day that passes, the odds of the precedent being treated positively decreases by a factor of 0.99 in the terrorism data set. If a precedent was a unanimous decision, the odds of the precedent being treated positively decrease by a factor of 0.53 and if the precedent was an *en banc* decision, the odds of the precedent being treated positively decrease by a factor of 0.61 in the terrorism data set. In the drug data set, the odds of a precedent increase by a factor of 2.38 if the precedent was an *en banc* decision. In the drug data set, the odds of the precedent being treated positively increases by a factor of 3.51 if the precedent is from the same circuit as the case under consideration.

Hypotheses Results

Hypothesis 1: When the outcome favors the government, the citing court (the progeny) is more likely to treat the cited precedent (parent) more favorably.

This research expected to find that terrorism precedents are treated positively when doing so favors the government in the outcome of the case. The results presented above found support for this expectation only in terrorism cases. These findings indicate that, the use of terrorism precedents contributes to a conservative "pull" on judicial policy making. The results also suggest that precedents from drug cases from the 1980s did not exert the same pro-government influence.[29]

This finding is consistent with the analysis of terrorism precedents from *Miranda* cases in Chapter 2 that found when these precedents were applied to ordinary criminal

[29] Drug cases were limited to precedents created in the 1980s while precedents from terrorism cases were not limited by when they were created. This study of drug precedents over a longer time period may produce different results.

procedure cases, they yield conservative, pro-government case outcomes. The quantitative analysis here suggests that this can be more broadly generalized and that their impact will be felt broadly in criminal procedure cases.

Posner and Stuntz believe that the judiciary favors the government in criminal procedure issues when the threats to security are high. Stuntz summarized his view of changes in judicial policy as the result of changes in security concerns stating:

> Crime fell in the 1940s and 1950s; Fourth Amendment rights expanded in the 1960s. Crime rose sharply in the 1960s; Fourth Amendment protection receded in the 1970s and 1980s. Crime fell again in the 1990s, and by the end of that decade Fourth Amendment rights were once again expanding (Stuntz 2001, 2155).

Posner similarly stated:

> The low crime rate in the 1950s set the stage for the Supreme Court in the 1960s to multiply the rights of criminal defendants; then crime rates rose rapidly (whether or not because of that multiplication) and there was a backlash and the Court curtailed defendants' rights both directly, by redefining constitutional rights, and indirectly, by upholding congressional limitations on those rights. The safer the nation feels, the greater the weight that the courts place on personal liberty relative to public safety (R. Posner 2006a, 40).

These viewed were also echoed by former Attorney General Michael Mukasey who believes that precedents from terrorism cases would change the standards in ordinary cases. This interpretation is also consistent with research by Sunstein who found that the judiciary ruled in favor of the government in cases of national security more often than other types of cases included criminal cases (Sunstein 2008b). As the number of terrorism prosecutions increases and more precedents from terrorism cases are created, it is important to understand the effect they will have on the court system. Chapter 2 examined the effect of terrorism precedents on *Miranda* decisions, but the quantitative results indicate that the impact of terrorism precedents will be widespread and not limited to one issue area. As the prosecution of terrorism cases increases, more precedents will

be created from these cases which will be cited by both terrorism and non-terrorism cases. This is likely to pull judicial policy in a conservative, pro-government direction.

Hypothesis 2: The older a precedent, the more likely it will be treated positively.

The effect of precedent age varied between the two policy areas. In model judicial treatment of precedents established as a result of the war on drugs, age did not affect the likelihood of favorable citation. For terrorism precedents, the effect was curvilinear: initially positive, peaking, and then declining in influence. This is an indication that the influence of terrorism precedents decreases over time and that they exert greater influence shortly after the precedent is decided.

It is interesting to note that the results for the terrorism precedent data set are the opposite of what is reported by Hansford and Spriggs (2006, 118). While Hansford and Spriggs looked at precedent at several levels, when the precedents of the Supreme Court were used by the federal courts of appeals, age squared was positively related to the precedent being followed. This study finds that precedents from terrorism cases are less likely to be viewed favorably after longer periods of time. One possibility for these findings is that terrorism cases represent a novel issue area so precedents are treated differently.

Hypothesis 3: The greater the precedent vitality, the more likely it is to be treated positively by subsequent cases.

The results did not support this hypothesis. As described earlier, precedent vitality was coded specifically for the issue area because precedents can be cited for many different reasons. Judicial treatment of *United States v. Bengivenga* provides an

example of a precedent used in more than one issue area. This case involves two suspects who were taken off of a bus at a border checkpoint and questioned. This case was cited in search and seizure issues raised in four circuit court cases and four district court cases. It was not cited by a state court in a search and seizure case. The same case was cited in an analysis of confessions issues nine times at the federal circuit court of appeals level, twelve times as a federal district court level and six times by state courts. By taking into account the issue area, this analysis provides a more specific measure of vitality.

The concept of vitality is that the more a precedent is treated positively, the more likely it will be to be treated positively in the future because the precedent becomes stronger. If a precedent is cited several times as a search and seizure precedent, it does not mean that its holding in other areas will be more persuasive. A precedent that is followed as a search and seizure precedent becomes stronger as more courts follow the precedent showing that the legal reasoning of the holding is sound.

This finding is at odds with one of the major findings of Hansford and Spriggs (2006). There may be some reasons for the difference in the findings. Hansford and Spriggs looked at precedents from the Supreme Court while this research used precedents from the circuit courts of appeals. Courts may be more willing to negatively treat precedents from the circuit court of appeals than from the Supreme Court. The Supreme Court only hears a limited number of cases each year compared to the circuit courts of appeals so negative treatment of a Supreme Court precedent by lower courts may increase the chance that a decision could be reversed. There is only one Supreme Court

and twelve circuit courts. Supreme Court opinions may have more vitality by virtue of the opinions coming from the Supreme Court.

The results also indicated that unanimous precedents are less likely to be treated positively by citing courts or, conversely, non-unanimous precedents that include a dissent are more likely to be treated positively by the citing court. This measure of vitality is contrary to the expectation that unanimous decisions of the circuit courts of appeals would be seen as having greater vitality and be more likely to be treated positively. Decisions where there is a dissenting opinion would indicate that there is some question for the legal basis for the decision and be more likely to be treated negatively. The findings are opposite to this logic.

While the case may be contrary to logic, a dissenting opinion may serve as an indicator of a more prominent, salient case. The circuit courts of appeals hear nearly 60,000 cases a year with the majority of the cases being unanimous decisions. A dissenting opinion is likely to draw attention to the case and more judges will become familiar with the decision. The presence of a dissenting opinion may separate the case from the other decisions allowing judges to learn of the case and cite it. Interestingly, this is often the opposite effect the judge writing the concurring opinion or dissenting opinion intended.

Hypothesis 4: Precedents from both the drug data set and the terrorism data set will be more influential in their own circuit than in other circuits.

The progeny of drug case precedents are more likely to positively treat precedents from their own circuit than precedents from outside the circuit. This is consistent with the results reported in Chapter 5. The progeny of precedents from terrorism cases were

not more likely to favorably treat terrorism precedents from the same circuit. The data from Chapter 5 indicate that terrorism precedents are treated positively both inside and outside their circuit. In the terrorism data set, the variable for state courts is not reported because all of the state courts used in the model positively treated precedents from terrorism cases so there was no variance.[30]

What the logit models indicates is that drug precedents exert more influence inside their circuit than outside their circuit. Tables 5.7 and 5.8 show that terrorism precedents are more likely to be treated positively compared to drug precedents although precedents from both issue areas are likely to be treated positively. Precedents from terrorism cases exert influence both inside their own circuit and outside their circuit. The law concerning drug cases is much more developed than the law concerning terrorism cases. The greater number of precedents and litigation in drug cases most likely limits its influence outside of its circuit compared to precedents from terrorism cases that are influential both inside and outside of its circuit.

Ideology

A substantial line of research suggests that judges decide cases that are consistent with their policy preference. Hansford and Spriggs (2006) found that the ideological distance between the citing court and the precedent court significantly influenced the use and treatment of precedents. There is no measure of ideology that can be used to compare the preferences of federal circuit judges, federal district judges, and state court judges in the same "policy space." Therefore, here, the party of the judge was used as a

[30] There is one state case that cites a terrorism precedent and treats it negatively. The ideology of the judge could not be determined, so it was not used in the logit models.

proxy for ideology. Ideological difference was found if the party of the judge writing the precedent and the judge writing the citing cases were from different political parties. Ideological distance was not significant in any of the models.

State court judges were dropped from the data set as a robustness check to determine if they influenced the significance of the ideology variable. Ideology may have a different meaning for state level officials than for federal officials. Dropping state level judges from the data set had no impact on the significance of the ideological variable and did not change the coefficients for the other variables either. The coefficient for ideology was not significant with or without state judges included in the data set.

Control Variables

Multiple models suggested the tendency of an upper court to affirm the decision of a lower court was an important control. Moreover, cases where the government was the challenger were more likely to result in a pro-government outcome. These variables support the theory that the government wins as an appellant and that reviewing courts show deference to the findings of lower courts.

Comparing precedential effects: drugs and terrorism

This research examined judicial treatment of precedents established as a result of the prosecution of two "wars": drugs and terrorism. The findings suggest some important differences in their precedential effects. The use of terrorism precedents pulled the government in a conservative direction assisting the government in prevailing in the outcome of subsequent cases. Terrorism precedents exerted more influence outside their

circuit than do drug precedents although they are also influential inside their own circuit. Precedents from terrorism cases are cited the most in the first years after the case is decided influencing subsequent cases. The early terrorism precedents are likely to be influential in the development of the law.

Concern for terrorism and the need to keep the country safe from terrorist attacks grew tremendously after September 11, 2001. The attempted Times Square bombing by Faisal Shahzad and the attempted airline bombing by Umar Farouk Abdulmutallab have helped to keep terrorism concerns at the forefront of national concerns. In response to the September 11, 2001 attacks, the FBI made significant changes to prioritize terrorism prevention and prosecution over other criminal activity. These changes mean that there will be an increase in the number of terrorism cases that enter the judiciary and that these cases will have important implications for the security of the country. This research has shown that because of the importance of the cases, the courts are more likely to rule in favor of the government. The largest number of these prosecutions is taking place in the second circuit of the federal government in New York City which not only was a target of the September 11, 2001 attack, but is also one of the more likely targets for future acts of terrorism in the United States. These rulings that favor the government will create precedents that will then be used in more common criminal procedure cases.

The standards for violations of search and seizure, *Miranda*, or other criminal procedure issues do not legally vary depending on the severity of the crime. A Fourth Amendment violation or a *Miranda* violation uses the same standards regardless of the security implications of the case or how important the case is viewed. If the cases involves an issue that is important to national security such as the possibility of freeing a

violent terrorist who may attempt to kill hundreds of citizens, the judges who are citizens of the United States will likely desire for the government to prevail in those cases. A few quotes from Federal Circuit Judge Richard Posner help to explain the position of this research:

> Judges, knowing little about the needs of national security, are unlikely to oppose their own judgment to that of the executive branch, which is responsible for the defense of the nation (2006, 9).
> …a nonlegal "law of necessity" that would furnish a moral and political but not legal justification for acting in contravention of the Constitution may trump constitutional rights in extreme situations (2006, 12).

The law of terrorism is in its infancy. Our legal system changes gradually as precedents are created and then interpreted by other courts. As more terrorism cases make their way into the courts, they will pull the judiciary in a conservative direction increasing the power of the government and decreasing civil liberties.

CHAPTER 7

CONCLUSIONS, LIMITATIONS AND FURTHER RESEARCH

The development of case law pertaining to criminal procedure is an important area of study for judicial politics. The rights afforded to citizens of the United States represent core principles of our judicial system and, to a larger extent, our society. Understanding that judges, courts, and judicial policy are influenced by events outside of the court system is important to understanding how our judicial system functions. Judges, like other members of society, want to ensure the safety and security of their nation and community. Cases involving extreme facts that can affect the security of the county will affect the votes of judges. As precedents are created they will affect more than the current case under consideration. Precedents affect the development of the law as they are applied to future cases and, in turn, create additional precedents. This research has shown that precedents from terrorism cases will likely pull judicial policy in a conservative, pro-government direction. This change will affect criminal procedure broadly and impact non-terrorism cases.

Implications for Public Policy

Scholars and policy makers continue to debate the use of military tribunals to try terrorism suspects rather than have terrorism suspects tried in criminal courts. Attorney General Eric Holder at one time announced that suspects in the September 11, 2001

bombings would be tried in regular criminal courts and not military tribunals. Many politicians including House Speaker John Boehner disagreed stating, "the decision by the administration to try terrorists in civilian courts was the wrong one from day 1" because "terrorists should be tried in military, not civilian, courts" (Savage 2010b). Proponents of trying the suspects in civilian criminal courts claim that even if the suspects would be acquitted, they would not be released (Savage 2010b). This research does not attempt to resolve this debate, but the findings raise some implications for public policy from this research.

As the number of terrorism trials increases and as precedents from these cases are created, the results of this analysis suggest that terrorism precedents will pull criminal procedure doctrine in a conservative, pro-government direction. Additionally, the examination of where cases are cited shows that precedents from terrorism cases are influential both inside and outside their circuit. Precedents from terrorism cases are treated positively more often than precedents from drug cases especially outside their circuit. Terrorism precedents are even influential in state courts where there are few if any prosecutions of terrorism cases. The impact of terrorism precedents is likely to widespread across the judiciary and not limited to the circuit where the case is tried.

In the political debate over the prosecution of terrorism suspects, the more liberal party, the Democrats, have advocated for trying terrorism suspects in civilian criminal courts. The conservative party, the Republicans, have advocated for the use of military tribunals. The use of criminal courts will provide terrorism suspects with additional rights that would not be provided to them in a military tribunal. Ironically, by trying

terrorists in criminal, civilian courts, the effect will be the establishment of precedents that curtail the rights of criminal defendants more broadly.

In discussing the reasons for trying terrorist suspects in military or civilian court, it is useful to understand that the debate includes issues other than the effect on our judicial system. Professor Stephen Schulhofer explains that it is important to the reputation of United States:

> Quite simply, terrorism suspects can and should be indicted and tried for their alleged crimes in the ordinary civilian court system. That approach will avoid further damage to America's reputation for respecting human rights, and it will enhance our ability to win the whole-hearted cooperation of our allies in the global counterterrorism effort. (Schulhofer 2008, 63–64).

While this research finds that terrorism cases will impact judicial policy, there are other reasons for trying terrorist suspects in civilian criminal courts. While there are some implications for public policy from this research, a determination of the impacts of trying suspects in military or civilian courts is beyond the scope of this research.

Further Study and Limitations

As the number of prosecutions from terrorism cases increases, more cases will work their way through the judiciary and become precedents. The development of case law occurs incrementally and slowly over time as precedents are created. As more precedents are created from terrorism cases, it will be important to determine their effect on the judiciary. This research highlighted the impact on Miranda decisions, but other areas of criminal procedure such as search and seizure may also be impacted by terrorism precedents. It will be important for future research to examine precedents from terrorism

prosecutions to determine if they continue to pull judicial policy in a pro-government direction and if it impacts other areas of criminal procedure.

While the circuit courts of appeals are influential in the development of law, it will be important to examine the impact of any terrorism precedent concerning a criminal procedure issue from the Supreme Court. So far, the Court has not ruled on the issues addressed in this study. The Supreme Court recently ruled against the government in *United States v. Jones* concerning the use of global positioning system (GPS) devices without a warrant. During the oral argument, the Deputy Solicitor-General attempted to argue that a need to track a terrorism suspect without a warrant would justify their use, but he was not successful in his argument. While *Jones* was a drug case and not a terrorism case, if the Supreme Court issues a criminal procedure ruling from a terrorism case it will be important to study the impact of that precedent.

Chapter 2 discussed the possible impact of precedent from the prosecution of terrorism cases on search and seizure law. Current case law uses the reasonableness standard to determine if a search is valid because American law enforcement cannot obtain a search warrant in a foreign country. Currently, as long as a search is reasonable, the evidence from the search will be allowed in court. The courts in *In re Terrorist Bombings, United States v. Stokes,* and *United States v. Defreitis,* decided that a faulty search warrant did not prevent the evidence obtained in those searches from being admitted into court as long as the search was reasonable. It will be important to determine how far these rulings extend. Will courts maintain the reasonableness standard if a local judge rules the search violated domestic law in that country?[31] It is possible that

[31] A recent high profile prosecution of a person suspected of internet crimes in New Zealand may bring this issue more attention. The FBI investigated and assisted in the arrest of Kim Dotcom including the seizure

it may be easier for federal law enforcement officials to obtain incriminating evidence in other countries than in the United States. Federal law enforcement officials would have less incentive to provide rights to suspects in other countries than to suspects in the United States. It is possible that this could lead to cooperative agreements between the United States and other countries to avoid upholding individual rights. It will be important for future research to examine the impact of the precedents from terrorism prosecutions on the policy of federal law enforcement agencies as well as the development of criminal procedure law.

In addition to *Miranda* and search and seizure, there are other areas of criminal procedure that are likely to be affected by precedents from terrorism cases. The use of *habeas corpus*, concepts of venue and jurisdiction, access to evidence in cases involving classified or sensitive information, and jury selection are all areas that can be influenced. It is possible that precedents from terrorism cases will limit the rights of citizens in these areas or that terrorism prosecutions may influence the creation of policy in these areas.

This research focused on the influence of precedents from terrorism cases as a security concern, but it is possible that other cases that pose a security concern may also influence the development of law. In 1977, the Supreme Court ruled that any statements made to suspects for the purpose of eliciting an incriminating statement fell under the *Miranda* restrictions with the famous "Christina Burial Speech" in *Brewer v. Williams*. The case involved the murder of a ten year old female by an escaped mental patient. In his dissent in the case Chief Justice Warren Burger stated "Williams is guilty of the savage murder of a small child; no member of the Court contends he is not" (*Brewer v.*

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of several items. A New Zealand court ruled the search was illegal, although much of the evidence is already in the hands of the FBI. See ("Dotcom search warrants ruled illegal" 2012).

Williams 1977, 416). Burger decried the "decline in our jurisprudence" because of the "absurd extent" of extending the exclusionary rule (*Brewer v. Williams* 1977, 416-417). There is obvious concern for the safety of the community in allowing a confessed child killer to go free. In his majority opinion, Justice Potter Stewart indicated that even though the statements were suppressed, the physical body of the victim might be allowed in court if the case was retried (*Brewer v. Williams* 1977, 406). The case made its way back to the Supreme Court in the case of *Nix v. Williams* which created the inevitable discovery exception to the exclusionary rule to allow the body of the victim to be used in court against the defendant. It is rare for a case to be heard by the Supreme Court, but it is extremely rare for a case to be heard by the Supreme Court twice creating two major rulings. The murder of ten year old Pamela Powers by Robert Williams was of such great concern that not only did the majority opinion suggest a means of successfully prosecuting the suspect, but the case returned to the Supreme Court where a new exception to the exclusionary rule was created to allow for the prosecution of a dangerous suspect.

This research focused on the influence of precedents from the prosecution of terrorism cases. Other security areas are also likely to influence judicial policy. *Nix v. Williams* provides one example of the Supreme Court creating an exception to the exclusionary rule due to the dangerous nature of a suspect. A study of murder cases, sex crimes, or crimes against children may reveal a similar pattern where judicial policy is influenced by the need to successfully prosecute specific cases and protect the public. Future research on the impact of other important criminal cases will assist in this understanding.

Another area for future study is the influence of precedents over time. Precedents from terrorism cases are greatly influential after they are created, but decrease greatly over time. Precedents from the prosecution of drug cases showed a different pattern as their influence peaked approximately twenty years after they precedent was decided. It will be important to determine if this pattern holds true for terrorism cases or if the pattern of their influence changes to become similar to the influence of precedents from the prosecution of drug cases. As terrorism law becomes more developed, precedents may increase in influence over time rather than quickly decrease. It may be that since drug cases are more common than terrorism cases, the pattern may not change. It is also possible that the use of precedents in terrorism and drug cases are due to the emphasis in the prosecution of certain types of criminals. If the government makes terrorism or drug cases a priority, it would be logical that an increase in citations to precedents from those types of cases would increase as well. It will be important study the use of precedents over time and if the pattern of the use of precedents from terrorism prosecutions changes over time.

The development of law related to terrorism is in its infancy. As more cases make their way through the judiciary it will be important to study the impact these cases have on judicial policy. It is possible for Americans to become desensitized to the danger posed by terrorists and for these cases be treated similar to common criminal cases. Alternatively, they may continue to pull the judiciary in a pro-government direction. Further research on their impact and the impact of any Supreme Court decisions will be important.

REFERENCES

Ackerman, Bruce A. 2006. *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*. New Haven: Yale University Press.

Aldisert, Ruggero. 1989. "Precedent: What It Is and What It Isn't: When Do We Kiss It and When Do We Kill It." *Pepperdine Law Review* 17: 605.

Alexander, L. 1989. "Constrained by precedent." *S. Cal. L. Rev.* 63: 1.

Allen, John. 2008. "Expanding Law Enforcement Discretion: How the Supreme Court's Post-September 11th Decisions Reflect Necessary Prudence." *Suffolk University Law Review* 41: 587.

Baker, Peter. 2010. "Arrest Renews Debate About Rights of Suspects in Terrorism Cases." *New York Times*. http://query.nytimes.com/gst/fullpage.html?res=9801E6DB153EF936A35756C0A9669D8B63&scp=1&sq=Arrest%20Renews%20Debate%20About%20Rights%20of%20Suspects%20in%20Terrorism%20Cases&st=cse (Accessed January 15, 2012).

Baum, Lawrence. 1980. "Responses of Federal District Judges to Court of Appeals Policies: An Exploration." *The Western Political Quarterly* 33(2): 217–224.

Belenko, Steven R. 1993. *Crack and the Evolution of Anti-Drug Policy*. Westport, Conn: Greenwood Press.

———. 1990. "The Impact of Drug Offenders on the Criminal Justice System." In *Drugs, Crime and the Criminal Justice System*, Cincinnati, OH: Anderso Publishing Co., p. 27–78.

Benesh, Sara, and Malia Reddick. 2002. "Overruled: An event history analysis of lower court reaction to Supreme Court alteration of precedent." *Journal of Politics* 64(2): 534–550.

Boyd, Christina, and James Spriggs. 2009. "Examination of Strategic Anticipation of Appellate Court Preferences by Federal District Court Judges, An." *Washington University Journal of Law & Policy* 29: 37.

Brace, P., and M. G. Hall. 2001. "'Haves' versus 'have nots' in state Supreme Courts: Allocating docket space and wins in power asymmetric cases." *Law & Society Review* 35: 393–417.

Bradley-Engen, Mindy, Kelly Damphousse, and Brent Smith. 2009. "Punishing Terrorists A Re-Examination of U.S. Federal Sentencing in the Postguidelines Era." *International Criminal Justice Review* 19(4): 433–455.

Brenner, Saul, and Harold Spaeth. 1995. *Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946-1992*. New York, N.Y: Cambridge University Press.

Brent, J.C. 1999. "An agent and two principals." *American Politics Research* 27(2): 236–266.

Breyer, Stephen. 2003. "Liberty, Security, and the Courts." http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_04-15-03.html (Accessed March 24, 2012).

Brisbin, Richard. 1996. "Slaying the Dragon: Segal, Spaeth and the Function of Law in Supreme Court Decision Making." *American Journal of Political Science* 40(4): 1004–1017.

Caldeira, Gregory. 1983. "On the Reputation of State Supreme Courts." *Political Behavior* 5(1): 83–108.

———. 1985. "The Transmission of Legal Precedent: A Study of State Supreme Courts." *The American Political Science Review* 79(1): 178–194.

Caldeira, Gregory, and John Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court." *The American Political Science Review* 82(4): 1109–1127.

Caminker, E.H. 1994. "Why Must Inferior Courts Obey Superior Court Precedents?" *Stanford Law Review*: 817–873.

Chandler, Sara A. 2006. "Collateral Damage - The Impact of National Security Crises on the Fourth Amendment Protection against Unreasonable Searches." *University of Pittsburgh Law Review* 68: 217.

Chesney, R.M. 2008. "Terrorism, Criminal Prosecution, and the Preventive Detention Debate." *S. Tex. L. Rev.* 50: 669.

Cole, David. 2002. *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*. 2nd ed. New York: New Press.

Cross, Frank. 2007. "Chief Justice Roberts and Precedent: A Preliminary Study." *NCL Rev.* 86: 1251.

Cross, Frank et al. 2010. "Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance." *University of Illinois Law Review* 2010: 489.

Cross, Frank. 2003. “Decisionmaking in the US Circuit Courts of Appeals.” *California Law Review* 91(6): 1457–1515.

“Dotcom search warrants ruled illegal.” 2012. *The Sydney Morning Herald*. http://www.smh.com.au/technology/technology-news/dotcom-search-warrants-ruled-illegal-20120628-214ps.html (Accessed June 28, 2012).

Duxbury, Neil. 1995. *Patterns of American Jurisprudence*. Oxford: Clarendon Press.

Epstein, Lee et al. 2008. “Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court.” *U. Pa. L. Rev.* 157: 833.

———. 2005. “The Supreme Court during crisis: how war affects only non-war cases.” *New York University Law Review* 80(1): 1–116.

Farber, Daniel, and Suzanna Sherry. 2009. *Judgment Calls : Principle and Politics in Constitutional Law*. Oxford ; New York : Oxford University Press, 2009.

Farole, Donald. 1999. “Reexamining Litigant Success in State Supreme Courts.” *Law & Society Review* 33: 1043–1058.

Friedman, Barry. 2006. “Taking Law Seriously.” *Perspectives on Politics* 4(02): 261–276.

Galanter, Marc. 1975. “Afteword: Explaining Litigation.” *Law & Society Review* 9: 347–368.

———. 1974. “Why the ‘Have’ Come out Ahead: Speculations on the Limits of Legal Change.” *Law & Society Review* 9: 95–160.

Gerhardt, Michael J. 2008. *The Power of Precedent*. Oxford ; New York: Oxford University Press.

Glick, Henry. 1992. “Judicial Innovation and Policy Re-Invention: State Supreme Courts and the Right to Die.” *The Western Political Quarterly* 45(1): 71–92.

Goldsmith, Jack. 2010. “Don’t Try Terrorists, Lock Them Up.” *The New York Times*. http://www.nytimes.com/2010/10/09/opinion/09goldsmith.html (Accessed October 31, 2010).

Goldstein, Paul et al. 1997. “Crack and Homicide in New York City: A Case Study in the Epidemiology of Violence.” In *Crack in America: Demon Drugs and Social Justice*, Los Angeles: University of California Press, p. 113–130.

Greenhouse, Linda. 2001. “In New York Visit, O’Connor Foresees Limits on Freedom.” *New York Times*: 5.

Gruhl, J. 1980. “The Supreme Court’s impact on the law of libel: compliance by lower federal courts.” *The Western Political Quarterly*: 502–519.

Haire, Susan. 2008. “Relations Among Courts.” In *The Oxford Handbook of Law and Politics*, New York, N.Y: Oxford University Press, p. 503–521.

Hansford, Thomas, and James Spriggs. 2006. *The politics of precedent on the US Supreme Court*. Princeton Univ Pr.

Hettinger, Virginia, Stefanie Lindquist, and Wendy Martinek. 2007. *Judging on a Collegial Court: Influences on Federal Appellate Decision Making*. University of Virginia Press.

Holmes, Oliver Wendell. 1993. “The Common Law.” In *American Legal Realism*, New York, N.Y: Oxford University Press, p. 9.

Howard, J. W. 1981. *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits*. Princeton University Press.

Israel, Jerold H. et al. 2011. *Criminal Procedure and the Constitution, Leading Supreme Court Cases and Introductory Text, 2011*. 2011th ed. West.

Johnson, Charles. 1987. “Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions.” *Law & Society Review* 21(2): 325–340.

Kamin, S. 2007. “How the War on Terror May Affect Domestic Interrogations: The 24 Effect.” *Chapman Law Review* 10(3): 693–712.

Klein, David. 2002. *Making Law in the United States Courts of Appeals*. Cambridge ; New York: Cambridge University Press.

Klein, David, and Robert Hume. 2003. “Fear of Reversal as an Explanation of Lower Court Compliance.” *Law & Society Review* 37(3): 579–581.

Knight, Jack, and Lee Epstein. 1996. “The Norm of Stare Decisis.” *American Journal of Political Science* 40(4): 1018–1035.

Kosma, M.N. 1998. “Measuring the influence of Supreme Court justices.” *The Journal of Legal Studies* 27(2): 333–372.

Kritzer, Herbert. 2003. “The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?” In *In Litigation: Do the “Haves” Still Come Out Ahead*, Stanford, California: Stanford University Press, p. 342–370.

Kritzer, Herbert, and Mark Richards. 2005. “The influence of law in the Supreme Court’s search-and-seizure jurisprudence.” *American Politics Research* 33(1): 33.

LaFree, G., and J. Hendrickson. 2007. “Build a criminal justice policy for terrorism.” *Criminology & Public Policy* 6(4): 781–790.

Landes, William, Lawrence Lessig, and Michael E. Solimine. 1998. “Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges.” *The Journal of Legal Studies* 27(2): 271–332.

Landes, William, and Richard Posner. 1976. *Legal precedent: A theoretical and empirical analysis*. National Bureau of Economic Research Cambridge, Mass., USA.

Lee, Emory. 2003. “Horizontal Stare Decisis on the US Court of Appeals for the Sixth Circuit.” *Ky. LJ* 92: 767.

———. 2005. “Precedent Direction and Compliance: Horizontal Stare Decisis on the US Court of Appeals for the Sixth Circuit.” *Seton Hall Cir. Rev.* 1: 5.

Lewis, Carol W. 2005. “The Clash between Security and Liberty in the U.S. Response to Terror.” *Public Administration Review* 65(1): 18–30.

Lindquist, Stefanie. 2011. “Stare Decisis as Reciprocity Norm.” In *What’s Law Got to Do With It?: What Judges Do, Why They Do It, and What’s at Stake*, Stanford, California: Stanford University Press, p. 173–191.

Lindquist, Stefanie, and Frank Cross. 2005. “Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent.” *New York University Law Review* 80: 1156.

Llewellyn, Karl. 1993. “Some Realism about Realism - Responding to Dean Pound.” In *American Legal Realism*, New York, N.Y: Oxford University Press, p. 68–75.

Lobel, J. 2001. “War on Terrorism and Civil Liberties, The.” *U. Pitt. L. Rev.* 63: 767.

Maltz, E. 1987. “Nature of Precedent, The.” *NCL Rev.* 66: 367.

Mattis, T. 1990. “Stare Decisis Within Michigan’s Court of Appeals: Precedential Effect of Its Decisions on the Court Itself and on Michigan Trial Courts.” *Wayne L. Rev.* 37: 265.

Mead, J. 2011. “Stare Decisis and the Inferior Courts of the United States.” SSRN: http://ssrn.com/abstract=1765145.

Merola, Linda. 2004. “The Influence of Stare Decisis on the votes of United States Supreme Court Justices: A Second Look.” In Inter-Continental Hotel, New Orleans, La. http://www.allacademic.com/meta/p67790_index.html.

Morriss, Andrew P., Michael Heise, and Gregory C. Sisk. 2005. "Signaling and Precedent in Federal District Court Opinions." *Supreme Court Economic Review* 13: 63–97.

Mueller III, R. S. 2005. "New FBI: Protecting Americans against Terrorism, The." *Notre Dame Journal of Law, Ethics & Public Policy* 19: 327.

Mukasey, Michael B. 2007. "Jose Padilla Makes Bad Law; Terror trials hurt the nation even when they lead to convictions." *The Wall Street Journal (Online and Print)*.

Murphy, Walter et al. 2006. *Courts, Judges, & Politics: An Introduction to Judicial Politics*. Sixth. New York, N.Y: McGraw-Hill.

Posner, Eric, and Adrian Vermeule. 2007. *Terror in the Balance: Security, Liberty, and the Courts*. Oxford University Press, USA.

Posner, Richard. 2000. "An economic analysis of the use of citations in the law." *American Law and Economics Review* 2(2): 381–406.

———. 2006a. *Not a Suicide Pact: The Constitution in a Time of National Emergency*. Oxford University Press, USA.

———. 2006b. *Uncertain Shield: The U.S. Intelligence System in the Throes of Reform*. 1st ed. Rowman & Littlefield Publishers.

Powell, Lewis F. Jr. 1990. "Stare Decisis and Judicial Restraint." *Washington and Lee Law Review* 47: 281.

Power, Robert C. 2006. "Changing Expectations of Privacy and the Fourth Amendment." *Widener Law Journal* 16(1): 43–70.

Randazzo, Kirk. 2008. "Strategic Anticipation and the Hierarchy of Justice in U.S. District Courts." *American Politics Research* 36(5): 669–693.

Rehnquist, W.H. 1998. *All the laws but one: Civil liberties in wartime*. Alfred A. Knopf.

Richards, Mark, and Herbert Kritzer. 2002. "Jurisprudential regimes in Supreme Court decision making." *American Political Science Review* 96(02): 305–320.

Rosenthal, Lawrence. 2004. "Crime Drop and the Fourth Amendment: Toward an Empirical Jurisprudence of Search and Seizure, The." *New York University Review of Law & Social Change* 29: 641.

Said, Wadie. 2010. "Coercing Voluntariness." *Indiana Law Journal, Vol. 85, No. 1, 2010*.

Samaha, Joel. 2011. *Criminal Procedure*. 8th ed. Wadsworth Publishing.

Savage, Charlie. 2009. "Accused 9/11 Mastermind to Face Civilian Trial in N.Y." *The New York Times*.

http://www.nytimes.com/2009/11/14/us/14terror.html?pagewanted=1&_r=1 (Accessed October 25, 2010).

———. 2010a. "Attorney General Backs Miranda Limit for Terror Suspects." *The New York Times*. http://www.nytimes.com/2010/05/10/us/politics/10holder.html (Accessed January 15, 2012).

———. 2010b. "Ghailani Verdict Reignites Debate Over the Proper Court for Terrorism Trials." *New York Times*: 18.

"Scalia addresses wartime constitutional rights | wkyc.com." 2003. *wkyc.com*. http://www.wkyc.com/news/article/3830/0/Scalia-addresses-wartime-constitutional-rights (Accessed March 24, 2012).

Scalia, Antonin. 1989. "The Rule of Law as a Law of Rules." *The University of Chicago Law Review* 56(4): 1175–1188.

Schubert, Glendon A. 1965. *Judicial Policy-Making; the Political Role of the Courts*. Chicago: Scott, Foresman.

Schulhofer, S. J. 2008. "Prosecuting Suspected Terrorists: The Role of the Civilian Courts'." *Advance: The Journal of the ACS Issue Groups* 2(2): 64.

Segal, Jeffrey. 2011. "What's Law Got to Do with It: Thoughts from the 'Realm of Political Science'." In *What's Law Got to Do With It?: What Judges Do, Why They Do It, and What's at Stake*, Stanford, California: Stanford University Press, p. 17–40.

Segal, Jeffrey, and Harold Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. Cambridge ; New York, NY: Cambridge University Press.

———. 2002. *The Supreme Court and the attitudinal model revisited*. Cambridge Univ Pr.

Sheehan, Reginald. 1992. "Governmental Litigants, Underdogs, and Civil Liberties: A Reassessment of a trend in Supreme Court Decision Making." *The Western Political Quarterly* 45: 27–39.

Skolnick, Jerome et al. 1997. "The Social Structure of Street Drug Dealing." In *Drugs, Crime and Justice*, Prospect Heights, IL: Waveland Press, Inc, p. 159–191.

Sloan, A. 2009. "The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals."

Songer, Donald, and Susan Haire. 1992. "Integrating alternative approaches to the study of judicial voting: Obscenity cases in the US courts of appeals." *American Journal of Political Science*: 963–982.

Songer, Donald, Jeffrey Segal, and Charles Cameron. 1994. "The hierarchy of justice: Testing a principal-agent model of Supreme Court-circuit court interactions." *American Journal of Political Science* 38(3): 673–696.

Songer, Donald, and Reginald Sheehan. 1990. "Supreme Court Impact on Compliance and Outcomes: Miranda and New York Times in the United States Courts of Appeals." *The Western Political Quarterly*: 297–316.

———. 1992. "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals." *American Journal of Political Science* 36: 235–258.

Songer, Donald, Reginald Sheehan, and Susan Haire. 1999. "Do the 'Haves' Come out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988." *Law & Society Review* 33(4): 811–832.

Spaeth, Harold. 1965. "'Jurimetrics and Professor Mendelson: A Troubled Relationship'." *The Journal of Politics* 27(04): 875–880.

———. 1999. *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court*. Cambridge ; New York: Cambridge University Press.

———. 1979. *Supreme Court Policy Making: Explanation and Prediction*. San Francisco: W. H. Freeman.

Stevenson, Drury D. 2011. "Effect of the National Security Paradigm on Criminal Law." *Stanford Law & Policy Review* 22(1): 129–176.

Stuntz, William. 2001. "Local policing after the terror." *Yale LJ* 111: 2137.

Sunstein, Cass. 2008a. "Judging National Security Post-9/11: An Empirical Investigation." *Harvard Law School Program on Risk Regulation Research Paper, Harvard Public Law Working No. 08-53, U of Chicago Law & Economics, Olin Working Paper No. 441, U of Chicago, Public Law Working Paper No. 245*.

———. 2008b. "Judging National Security Post-9/11: An Empirical Investigation." *The Supreme Court Review* 2008(1): 269–291.

Tyler, T.R., and G. Mitchell. 1994. "Legitimacy and the empowerment of discretionary legal authority: The United States Supreme Court and abortion rights." *Duke Law Journal*: 703–815.

Vladeck, S. 2010. "Terrorism Trials and the Article III Courts After Abu Ali." *Texas Law Review, Forthcoming, American University, WCL Research Paper No. 2010-09*.

Wahlbeck, Paul. 1997. "The Life of the Law: Judicial Politics and Legal Change." *The Journal of Politics* 59(3): 778–802.

Walsh, David J. 1997. “On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases.” *Law & Society Review* 31(2): 337–361.

Weisselberg, Charles D. 2008. “Terror in the courts: Beginning to assess the impact of terrorism-related prosecutions on domestic criminal law and procedure in the USA.” *Crime, Law and Social Change* 50(1-2): 25–46.

Williams, Ryan T. 2010. “Stop Taking The Bait: The Dilution of Miranda Does Not Make America Safer From Terrorism.” *Loyola Law Review* 56 Loy. L. Rev. 907. http://works.bepress.com/ryan_williams/3/ (Accessed March 23, 2012).

LIST OF CASES

Florida v. J.L. 529 U.S. 266 (2000).

Fuman v. Georgia. 408 U.S. 238 (1972).

Gideon v. Wainwright. 372 U.S. 335 (1963).

Hirabayashi v. United States (320 U.S. 81 (1943).

Haynes v. Washington. 373 U.S. 503 (1963).

In re Terrorist Bombings. 552 F.3d 157 (2nd Cir. 2008).

In re Terrorist Bombings. 552 F.3d 177 (2nd Cir. 2008).

Johnson v. Eisentrager. 339 U.S. 763 (1950).

Johnson v. Zerbst. 304 U.S. 458 (1938).

Khaled A.F. Al Odah v. United States. 559 F.3d 539 (D.C. Cir. 2009).

Korematsu v. United States. 323 U.S. 214 (1944).

McDonald v. Chicago. 561 U.S. ___ (2010).

Mathews v. Diaz. 426 U.S. 67 (1976).

Mincey v. Arizona. 437 U.S. 385 (1978).

Miranda v. Arizona. 384 U.S. 436 (1966).

Missouri v. Seibert. 542 U.S. 600 (2004).

New Hampshire v. Mann. 2005 N.H. Super. LEXIS 6 (2005).

New York v. Quarles. 467 U.S. 649. (1984).

Nix v. Williams. 467 U.S. 431 (1984).

Oregon v. Hass. 420 U.S. 714 (1975).

People v. Gomez-Garcia. 224 P.3d 1019 (Colo. App. 2009).

Pfeifer v. U.S. Bureau of Prisons. 615 F.2d 873 (9th Cir. 1980).

Powell v. Alabama. 287 U.S. 45 (1932).

Rochin v. California. 342 U.S. 165 (1952).

Rogers v. Richmond. 365 U.S. 534 (1961).

Roviaro v. United States. 353 U.S. 53 (1957).

Schneckloth v. Bustamonte. 412 U.S. 218 (1973).

Stansbury v. California. 511 U.S. 318 (1994).

State v. Berkmeyer. 949 A 2d 984 (R.I. 2008).

State v. Nadeau. 1 A 3d 445 (ME 2010).

States v. Nagelberg. 434 F.2d 585 (2d Cir. 1970).

Stein v. New York. 346 U.S. 156 (1953).

United States v. Abu Ali. 395 F. Supp. 2d 338 (2005).

United States v. Abu Ali. 528 F. 3d 210 (4th Cir. 2008).

United States v. Abu-Jihaad. 2008 U.S. Dist. LEXIS 7653 (D.Conn. 2008).

United States v. Abu Marzook. 435 F. Supp. 2d 708 (N.D. Ill., 2006).

United States v. Aref. 533 F.3d 72 (2nd Cir. 2008).

United States v. Artis. 2010 U.S. Dist. LEXIS 97279 (2nd Cir. 2010).

United States v. Augustine. 2007 U.S. Dist. LEXIS 41739 (S.D. Miss. 2007).

United States v. Bagaric. 706 F.2d 42 (2nd Cir. 1983).

United States v. Balsys. 524 U.S. 666 (1998).

United States v. Barnwell. 477 F.3d 844 (6th Cir. 2007).

United States v. Beale. 731 F.2d 590 (1983).

United States v. Bengivenga. 845 F. 2d 593 (5th Cir. 1988).

United States v. Bin Laden. 132 F.Supp. 2d 168 (S.D.N.Y. 2001).

United States v. Brown. 510 F.3d 571 (1st Cir. 2007).

United States v. Buchanan. 773 F. Supp. 1207 (W.D. Wis 1989).

United States v. Chavarria. 443 F.2d 904 (9th Cir. 1971).

United Staes v. Clarke. 611 F. Supp. 2d 12 (2009).

United States v. Defreitas. 701 F. Supp. 2d 297 (2010).

United States v. Delaplane. 778 F.2d 570 (10th Cir. 1985).

United States v. Dickerson. 166 F.3d 667 (4th Cir. 1999).

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

United States v. Douglas. 82 F.3d 1315 (5th Cir. 1996).

United States v. Emory. 591 F.2d 1266 (9th Cir. 1978).

United States v. Estrada. 430 F.3d 606 (2nd Cir. 2005).

United States v. Harrell. 894 F.2d 120 (5th Cir. 1990).

United States v. Heller. 625 F.2d 594 (5th Cir. 1980).

United States v. Henley. 386 Fed. Appx. 370 (4th Cir. 2010).

United States v. Hensel. 509 F. Supp. 1396 (D. Me. 1981).

United Sates v. Hensel. 699. F.2d 18 (1st Cir. 1983).

United States v. Iqbal. 2009 U.S. Dist. LEXIS 10039 (S.D. Tex. 2009).

United States v. Jones. 2011. Oral Arguments. http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=10-1259.

United States v. Karake. 443 F. Supp. 2d 8 (D.D.C. 2006).

United States v. Khalil. 214 F.2d 111 (2d Cir. 2000).

United States v. Lira. 515 F.2d 68. (2d Cir. 1975).

United States v. Libby. 453 F. Supp. 2d 35 (D.C. Cir. 2006).

United States v. Lopez-Imitola. 2004 U.S. Dist. LEXIS 22634 (2004).

United States v. Marzook. 435 F. Supp. 2d 708 (2006).

United States v. Mejia. 448 F.3d 436 (D.C. Cir. 2005).

United States v. Navarro-Montes, 2011 U.S. Dist. LEXIS 8315 (S.D. Cal. 2011).

United States v. Patane. 542 U.S. 630 (2004).

United States v. Place. 462 U.S. 696 (1983).

United States v. Pringle. 751 F. 2d 419 (1st Cir. 1984).

United States v. Reyes. 353. F.3d 148 (2nd Cir. 2003).

United States v. Reyes. 249 F. Supp. 2d 277 (S.D.N.Y., 2003).

United States v. Riccio. 981 F.2d 587 (1st Cir. 1992).

United States v. Rommy. 506 F.3d 108 (2nd Cir. 2007).

United States v. Silvestri. 787 F.2d 736 (1st Cir. 1986).

United States v. Stokes. 2010 U.S. Dist. LEXIS 45370 (N.D. Ill. 2010).

United States v. Stokes. 710 F. Supp. 2d 689 (2009).

United States v. Straker. 596 F. Supp. 2d 80 (2009).

United States v. Torres-del Muro. 58 F. Supp. 2d 931 (C.D. Ill 1999).

United States v. Trenary. 473 F.2d 680 (9th 1973).

United States v. Verdugo-Urquidez. 494 U.S. 259 (1990).

United States v. Welch. 455 F.2d 211 (2d Cir. 1972).

United States v. White. 401 U.S. 745 (1971).

United States v. Yousef. 327 F. 3d 56 (2nd Cir. 2003).

United States v. Yunis. 867 F.2d 617 (D.C. Cir. 1989).

Ward v. Texas. 316 U.S. 547 (1942).

Wyoming v. Houghton. 526 U.S. 295 (1999).

APPENDIX A

LIST OF PRECEDENTS

Precedents from Drug Data Set

Case	Court	Citation	Decision Date	Times Cited
United States v. Vasey	UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	834 F.2d 782, 1987 U.S. App. LEXIS 16328	5/8/1987	24
United States v. Silvestri	UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT	787 F.2d 736, 1986 U.S. App. LEXIS 23627	4/1/1986	24
United States v. Andrus	UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT	775 F.2d 825, 1985 U.S. App. LEXIS 24358	10/22/1985	25
United States v. Lambert	UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT	771 F.2d 83, 1985 U.S. App. LEXIS 22335	8/16/1985	21
United States v. Hensel	UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT	699 F.2d 18, 1983 U.S. App. LEXIS 31057, 1984 A.M.C. 1907	1/25/1983	17
United States v. Walther	UNITED STATES COURT OF APPEALS, NINTH CIRCUIT	652 F.2d 788, 1981 U.S. App. LEXIS 20059	2/19/1981	27

Horton v. Goose Creek Independent Sch...	UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT	690 F.2d 470, 1982 U.S. App. LEXIS 24433	11/1/1982	29
United States v. Berry	UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT	670 F.2d 583, 1982 U.S. App. LEXIS 20874	3/19/1982	32
United States v. Castillo	UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	866 F.2d 1071, 1988 U.S. App. LEXIS 19484	11/5/1987	21
United States v. Bengivenga	UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT	845 F.2d 593, 1988 U.S. App. LEXIS 7002	5/25/1988	35
United States v. Sangineto-Miranda	UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT	859 F.2d 1501, 1988 U.S. App. LEXIS 14463	10/27/1988	42
United States v. Stone	UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT	866 F.2d 359, 1989 U.S. App. LEXIS 583	1/25/1989	23
United States v. La France	UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT	879 F.2d 1, 1989 U.S. App. LEXIS 10185	7/17/1989	18

Precedents for Terrorism Data Set

Case	Court	Citation	Decision Date	Times Cited
United States v. Polk	UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT	118 F.3d 286; 1997 U.S. App. LEXIS 17887	7/17/1997	5
United States v. Rezaq	UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT	134 F.3d 1121; 328 U.S. App. D.C. 297; 1998 U.S. App. LEXIS 1660; 48 Fed. R. Evid. Serv. (Callaghan) 1079	2/6/1998	17
United States v. McVeigh	UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT	153 F.3d 1166; 1998 U.S. App. LEXIS 21877	9/8/1998	32
United States v. Cleaver	UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT	163 Fed. Appx. 622; 2005 U.S. App. LEXIS 26793	12/6/2005	1
United States v. Nichols	UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT	169 F.3d 1255; 1999 U.S. App. LEXIS 3059	2/26/1999	26
United States v. Nichols	UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT	2000 U.S. App. LEXIS 33183; 2000 Colo. J. C.A.R. 6738	12/18/2000	1
United States v. Khalil	UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	214 F.3d 111; 2000 U.S. App. LEXIS 11965	5/31/2000	14
United States v. Wise	UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT	221 F.3d 140; 2000 U.S. App. LEXIS 18282	7/31/2000	19
United States v. Graham	UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT	275 F.3d 490; 2001 U.S. App. LEXIS 26685	12/17/2001	34

United States v. Aref	UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	285 Fed. Appx. 784; 2008 U.S. App. LEXIS 14032	7/2/2008	1
United States v. Yousef	UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	327 F.3d 56; 2003 U.S. App. LEXIS 6437	4/4/2003	55
United States v. Mandhai	UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT	375 F.3d 1243; 2004 U.S. App. LEXIS 13761; 17 Fla. L. Weekly Fed. C 721	7/2/2004	10
United States v. Hammoud	UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT	381 F.3d 316; 2004 U.S. App. LEXIS 19036; 65 Fed. R. Evid. Serv. (Callaghan) 338	9/8/2004	32
United States v. Hossein Afshari	UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	426 F.3d 1150; 2005 U.S. App. LEXIS 22517	9/9/2003	4
United States v. Dowell	UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT	430 F.3d 1100; 2005 U.S. App. LEXIS 26558; 96 A.F.T.R.2d (RIA) 7318	12/6/2005	7
United States v. Arnaout	UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT	431 F.3d 994; 2005 U.S. App. LEXIS 26246	12/2/2005	12
United States v. Khan	UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT	461 F.3d 477; 2006 U.S. App. LEXIS 22447	9/1/2006	14
United States v. Abdi	UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT	463 F.3d 547; 2006 U.S. App. LEXIS 24033	9/22/2006	4

United States v. Hassoun	UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT	476 F.3d 1181; 2007 U.S. App. LEXIS 1951; 20 Fla. L. Weekly Fed. C 249	1/30/2007	6
United States v. Nettles	UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT	476 F.3d 508; 2007 U.S. App. LEXIS 3104; 72 Fed. R. Evid. Serv. (Callaghan) 496	2/12/2007	6
United States v. Evans	UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT	478 F.3d 1332; 2007 U.S. App. LEXIS 3480	2/16/2007	14
United States v. Lakhani	UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT	480 F.3d 171; 2007 U.S. App. LEXIS 6085	11/28/2006	2
United States v. Chandia	UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT	514 F.3d 365; 2008 U.S. App. LEXIS 1262	1/23/2008	3
United States v. Hir	UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	517 F.3d 1081; 2008 U.S. App. LEXIS 3245	1/22/2008	8
United States v. Abu Ali	UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT	528 F.3d 210; 2008 U.S. App. LEXIS 12122	6/6/2008	20
United States v. Benkahla	UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT	530 F.3d 300; 2008 U.S. App. LEXIS 13302	6/23/2008	11
United States v. Tankersley	UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	537 F.3d 1100; 2008 U.S. App. LEXIS 17169	5/5/2008	3

United States v. Al-Moayad	UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	545 F.3d 139; 2008 U.S. App. LEXIS 20794; 77 Fed. R. Evid. Serv. (Callaghan) 938	10/2/2008	3
In re Terrorist Bombings of U.S. Embassies in E. Afr. v. Odeh	UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	552 F.3d 157; 2008 U.S. App. LEXIS 24054	11/24/2008	3
In re Terrorist Bombings of U.S. Embassies in E. Afr. v. Odeh	UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	552 F.3d 177; 2008 U.S. App. LEXIS 24052	11/24/2008	9
In re Terrorist Bombings of U.S. Embassies in E. Afr. v. Odeh	UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	552 F.3d 93; 2008 U.S. App. LEXIS 24057	11/24/2008	9
United States v. Dizdar	UNITED STATES COURT OF APPEALS, SECOND CIRCUIT	581 F.2d 1031; 1978 U.S. App. LEXIS 9927	7/27/1978	1
United States v. Ashqar	UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT	582 F.3d 819; 2009 U.S. App. LEXIS 21640	10/2/2009	1
United States v. Ressam	UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	593 F.3d 1095; 2010 U.S. App. LEXIS 2180	11/2/2009	2
United States v. Stone	UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT	608 F.3d 939; 2010 U.S. App. LEXIS 12750	6/22/2010	7
United States v. Marcano-Garcia	UNITED STATES COURT OF APPEALS, FIRST CIRCUIT	622 F.2d 12; 1980 U.S. App. LEXIS 17108	5/29/1980	2
United States v. Farhane	UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	634 F.3d 127; 2011 U.S. App. LEXIS 2201; 84 Fed. R. Evid. Serv. (Callaghan) 794	2/4/2011	2

United States v. Herrera	UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT	711 F.2d 1546; 1983 U.S. App. LEXIS 24712	8/19/1983	1
United States v. Layton	UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT	855 F.2d 1388; 1988 U.S. App. LEXIS 11251	6/17/1988	11
United States v. Yunis	UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT	867 F.2d 617; 276 U.S. App. D.C. 1; 1989 U.S. App. LEXIS 1462	1/30/1989	13
United States v. Yunis	UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT	924 F.2d 1086; 288 U.S. App. D.C. 129; 1991 U.S. App. LEXIS 1098	1/29/1991	13
United States v. Johnson	UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT	952 F.2d 565; 1991 U.S. App. LEXIS 29747; 34 Fed. R. Evid. Serv. (Callaghan) 1117	12/19/1991	5
United States v. McKinley	UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT	995 F.2d 1020; 1993 U.S. App. LEXIS 17597; 7 Fla. L. Weekly Fed. C 545	7/16/1993	6

APPENDIX B

LIST OF CODING DECISIONS

Notes for Coding Drug Cases:

United States v. Booker (2010 U.S. Dist. LEXIS 124839) - not coded because the ruling is a recommendation not a decision. The actual decision followed the recommendation (2010 U.S. Dist. LEXIS 124874) and this case was included in the data set.

United States v. Dill (2009 U.S. Dist. LEXIS 123549; 105 A.F.T.R.2d (RIA) 788) - not coded because the ruling is a recommendation not a decision.

Bortner v. Sheldon (2009 U.S. Dist. LEXIS 89556) - is a habeas corpus case from a sexual battery. It is not coded because it is a recommendation not a decision.

United States v. Reynolds (2009 U.S. Dist. LEXIS 71057) - not coded because it is a recommendation from a Magistrate judge

United States v. Van Dyke (2010 U.S. Dist. LEXIS 47652) - magistrate court decision with no district court case information

United States v. Duffy (2010 U.S. Dist. LEXIS 37563) - magistrate court decision. District court case included in the dataset

United States v. Dirr (2009 U.S. Dist. LEXIS 123549; 105 A.F.T.R.2d (RIA) 788) - Magistrate court decision

United States v. Perkins (166 F. Supp. 2d 1116; 2001 U.S. Dist. LEXIS 16008) - not used because the opinion was withdrawn by the court and no information was listed for the case.

United States v. Yee (129 F.R.D. 629; 1990 U.S. Dist. LEXIS 6679) was included. This is a Magistrate Court decision on discovery in a murder case. The defense wanted the population studies on which the government will base their comparison numbers (1 in 100,000 etc). The case was referred to this Magistrate for a decision.

Dodge v. Commissioner (981 F.2d 350; 1992 U.S. App. LEXIS 32220; 93-1 U.S. Tax Cas. (CCH) P50,021; 71 A.F.T.R.2d (RIA) 412) - not used becuse Hensel is not actually cited in the case.

United States v. Jarrett (338 F.3d 339, 2003 U.S. App. LEXIS 15017, 61 Fed. R. Evid. Serv. (CBC) 1530 (4th Cir. Va. 2003)) was coded as distinguishing the precedent not following. Shepherds codes it both ways, but the decision of the case was that it was unlike the precedent (U.S. v. Walther) because the government did not encourage the search.

United States v. Duffy (2010 U.S. Dist. LEXIS 37495) coded twice since it cited more than one precedent that was coded by Shephards.

Audio-Video World of Wilmington, Inc. v. Mhi Hotels Two, Inc (2010 U.S. Dist. LEXIS 142156) - is included in the data set. This is a magistrate ruling that was adopted by the district court. It is included because the district court adopted the findings of the Magistrate which makes the recommended rulings of the Magistrate binding.

United States v. Quiroz (57 F. Supp. 2d 805; 1999 U.S. Dist. LEXIS 21004) – originally it was not included in the data set because it was the recommendation of a Magistrate judge and there was no link to the actual district court case to determine if the decision was adopted by the court. A later search of the case shows that the recommended decision was adopted by the court and the case is included in the data set. The citation for the case that adopted the ruling is 57 F. Supp. 2d 805; 1999 U.S. Dist. LEXIS 17496.

B.C. v. Plumas Unified Sch. Dist., 1999 U.S. App. LEXIS 38863 (9th Cir. Cal. Sept. 20, 1999) - not included because the updated opinion was included in the dataset. It is the same case so both case were not listed to avoid double coding the case.

Alvis E. Dowty V. State of Arkansas (363 Ark. 1; 210 S.W.3d 850; 2005 Ark. LEXIS 414) - only lists two judges in the decision. One judge wrote the opinion and the other judge wrote a concurrence. No other judges are listed although the Arkansas Supreme Court has seven judges.

Rowland v. United States (2010 U.S. Dist. LEXIS 51190) - Magistrate judge decision that is included in the data set because the ruling of the Magistrate was adopted by the court.

United States v. Moore (625 F. Supp. 305; 1985 U.S. Dist. LEXIS 13399) - ruled as reversed because the magistrate recommended the evidence be suppressed. The government objected and the district court judge allowed the evidence in.

United States v. Torres-Sanchez (83 F.3d 1123; 1996 U.S. App. LEXIS 11186; 96 Cal. Daily Op. Service 3366; 96 Daily Journal DAR 8617) - not included in the data set because the opinion was removed and amended in 1996 U.S. App. Lexis 17314. The amended case only cites the parent case (United States v. Castillo).

United States v. Whitehead (849 F.2d 849; 1988 U.S. App. LEXIS 6940) – Originally identified as a parent case, but was later removed because it was cited almost exclusively for sentencing reasons. Rather than discussing new fact patterns as they related to the constitution or development of law, this case discusses the interpretation of a single law

and when it went into effect. While this can be the development of law as laws are passed, the emphasis on this research is how the court systems responds to changes in society to develop law rather than how it interprets laws passed by congress.

United States v. Saenz (2010 U.S. Dist. LEXIS 141954) - was not included in the data set because it is a Magistrate Court decision and I could not determine whether it was adopted by the district court or not. A search for Diane Marie Saenz only produced this case and this case does not link to any other case as a subsequent hearing.

Scheanette v. Riggins (2005 U.S. Dist. LEXIS 41777) - Is a Magistrate Court case that was included in the database. This case was adopted by a District Court in DALE DEVON SCHEANETTE # 999440 v. WANDA RIGGINS, ET AL. (2006 U.S. Dist. LEXIS 25213).

United States v. Darling (2010 U.S. Dist. LEXIS 81658) - is a Magistrate Court case that was included in the dataset. The case specifically says that certain evidence is permitted or suppressed rather than the ruling being a recommended ruling.

The State v. Folsom (285 Ga. 11; 673 S.E.2d 210; 2009 Ga. LEXIS 35; 2009 Fulton County D. Rep. 445) - Supreme Court of Georgia case. The case only lists Justice Benham as the author and states all the justices concur. In looking at the Georgia Supreme Court, they have seven justices. I looked at each justice to determine when they began serving on the court. Six of the current justices were on the court when this case was heard. They are listed in the dataset as having heard this case and the number of justices is listed at 7 even though I could not locate the name of the seventh justice on the court when this case was heard.

United States v. Faulkingham (295 F.3d 85; 2002 U.S. App. LEXIS 13655) coded as both Miranda and Exclusionary Rule issue because the question was whether information used to search from an un-Mirandized statement should be suppressed.

United States v. Shaw (2010 U.S. Dist. LEXIS 134169) is a Magistrate Court decision that was included in the dataset. It was adopted by the district court in United States v. Shaw (2010 U.S. Dist. LEXIS 133973).

Walen v. Embarq Payphone Servs. (2009 U.S. Dist. LEXIS 84659) - Magistrate Court decision that was included in the dataset. It was adopted by the district court in *Walen v. Embarq Payphone Servs.* (2009 U.S. Dist. LEXIS 84655)

United States v. Cross (2001 U.S. Dist. LEXIS 23363) - Magistrate Court decision that is not included in the dataset. I could not find where it was adopted by the district court. This case was cited by two other cases - once in the First District and once by the California Court of Appeals which is interesting since this is a Magistrate Court recommended ruling.

United States v. Peden (2007 U.S. Dist. LEXIS 61354) - Listed twice in the data set

because it is cited by two different precedents.

People v. Whitfield (46 Cal. App. 4th 947; 54 Cal. Rptr. 2d 370; 1996 Cal. App. LEXIS 576; 96 Cal. Daily Op. Service 4613; 96 Daily Journal DAR 7314) - could not find all the names of the judges. Included and coded as no female present.

United States v. Williams , 876 F.2d 1521, 1989 U.S. App. LEXIS 9983 (11th Cir. Fla. 1989) - parent case was removed from the date set and its progeny were not coded. The progeny from the case concern a vagueness challenge between the terms cocaine and cocaine base. They do not bring up issues of search and seizure, Miranda, or other constitutional issues.

United States v. Avery (128 F.3d 974, 1997 U.S. App. LEXIS 30229) is not included in the data set. The decision was withdrawn from the court and no information is listed for the case.

*United States v. Airman First Class Jiovanni V. Torre*s, United States Air Force (60 M.J. 559; 2004 CCA LEXIS 153) June 9, 2004, Decided - I could not find information on the judges to determine the gender.

Notes for Coding Decisions for Terrorism Data Set:

Jurisdiction and venue are both coded as jurisdiction.

United States of America, Plaintiff V. William L. Hart, II, Defendant (2009 U.S. Dist. LEXIS 72597)- This case is a Magistrate Court recommended decision that was included in the dataset because the decision was adopted by the district court in 2009 U.S. Dist. LEXIS 72473.

For some reason *Boatswain v United States* (2010 U.S. Dist. LEXIS 90523) does not show up in a recent Shepard's of *United States v. Yousef*. When looking up the case by citation it does follow *Yousef* so it is included in the dataset. I do not know why a recent Shepard's of *Yousef* fails to produce *Boatswain* when it appears that it should. [the case is now listed as *Frank v. United States* rather than Boatswain...Frank Boatswain - it does appear in a Shepards of *Yousef*]

Almog v. Arab Bank, PLC (471 F. Supp. 2d 257, 2007 U.S. Dist. LEXIS 5826 (E.D.N.Y. 2007)) is shows as both distinguishing and following *United States v. Yousef*. In the data set it is coded as distinguishing *Yousef*. Almog follows *Yousef* as it relates to the common use of referring to Law of Nations as meaning International Law. It distinguishes the case from *Yousef* in determining the jurisdiction of the court to hear the case. The case is coded as distinguishing from the precedent because following a parent case on nomeclature is not as important as distinguishing a case on a topic as important as jurisdiction.

United States v. Lopez-Imitola (2004 U.S. Dist. LEXIS 22634) - this case is listed as both distinguishing and following *Yousef*. In reading the case, it is clear that the case follows *Yousef* as the case is cited and quoted several times. In the data set the *Lopez-Imitola* is coded as following (positive treatment).

United States v. Marzook (435 F. Supp. 2d 708; 2006 U.S. Dist. LEXIS 37727) is listed twice in the dataset for following and distinguishing the same precedent. It is coded this way by Shepards. The case follows for one reason and distinguishes for a different reason.

United States v. Diaz (2010 U.S. Dist. LEXIS 140776) - Magistrate Court decision that was adopted by the district court in *United States v. Diaz* (2011 U.S. Dist. LEXIS 9084). Since it is a Magistrate Court decision that was adopted, it was included in the data set.

United States v. Stewart appears to be listed twice as Shepardized by *United States v. Yunis* (867 F.2d 617). *United States v. Stewart* (590 F.3d 93, 2009 U.S. App. LEXIS 28595) is coded and *United States v. Stewart* (2009 U.S. App. LEXIS 25184) is not coded. The cases were handed down on the same day (November 17, 2009), by the same judges, and the language in the decisions appears to be identical.

United States v. Libby (2006 U.S. Dist. LEXIS 67366) - is not included in the dataset. United States v. Libby (453 F. Supp. 2d 35, 2006 U.S. Dist. LEXIS 67350) is included in the dataset. Both decisions were handed down on the same day, by the same judge, and say the same thing (dealing with the standard to be used for allowing classified information to be used at trial. This is the Scotter Libby trial.

United States v. Simpson (113 Fed. Appx. 150, 2004 U.S. App. LEXIS 23042 (6th Cir. Tenn. 2004) - this case is not included in the data set because United States v. Simpson (116 Fed. Appx. 736, 2004 U.S. App. LEXIS 26049 (6th Cir. Tenn. 2004)) is included in the data set and they are the same case.

United States v. Ogden, 2008 U.S. Dist. LEXIS 86006 (W.D. Tenn. Sept. 22, 2008, is coded as following (positive treatment). The citation lists the case as both following and distinguishing the precedent. In reading the case, it says that this case is analogous to Graham (parent) case and explains why the two cases are similar.

United States v. Shephard (2010 U.S. Dist. LEXIS 85360 (E.D. Ky. Aug. 18, 2010)) - this case is coded as pro-government. This was a motion for a bond hearing. While a bond hearing was granted, the judge stated in the decision that there was a presumption that no condition of bond could could satisfy the danger and flight concerns for the defendant to be released.

United States v. Croxford, 2004 U.S. Dist. LEXIS 12156 (D. Utah June 29, 2004) is

not coded in the data set because *United States v. Croxford*, 324 F. Supp. 2d 1230, 2004 U.S. Dist. LEXIS 14250 (D. Utah 2004) is an identical case that is included in the data set. The words in the decision are the same and it was handed down by the same judge on the same day.

Johnson v. Gibson, 164 F.3d 496, 1998 U.S. App. LEXIS 32505, 1999 Colo. J. C.A.R. 499 (10th Cir. Okla. 1998) is not included in the data set because the decision was withdrawn.

Brown v. Coleman Co., 2007 U.S. Dist. LEXIS 96223 (D.N.M. Sept. 17, 2007), 2007 U.S. Dist. LEXIS 96221 (D.N.M. Sept. 17, 2007), 2007 U.S. Dist. LEXIS 96220 (D.N.M. Sept. 17, 2007), 2007 U.S. Dist. LEXIS 96218 (D.N.M. Sept. 17, 2007) were coded as one case. All of the cases deal with a motion in limine for the same parties. The decision was handed down by the same judge on the same day.

Pickens v. Chrones, 2010 U.S. Dist. LEXIS 136589 (C.D. Cal. Oct. 14, 2010) is a magistrate court case that was adopted by the circuit court in *Pickens v. Chrones*, 2010 U.S. Dist. LEXIS 136548 (C.D. Cal., Dec. 22, 2010)

United States v. Esver, 2011 U.S. Dist. LEXIS 48055 (N.D. Cal. Apr. 28, 2011) is not included in the dataset because it is a Magistrate Court decision that has not been adopted by this district court.

United States v. Hammoud is a widely cited case. It involves the prosecution of several individuals for several offenses included material support for a designated foreign terrorist organization. This case also deals with a sentencing issue about the application of *Blakely v. Washington* (542 U.S. 296). The discussion concerns whether a finding of fact by a judge that increases the sentence given to a defendant violates the 6th amendment. *Hammoud* said that the decision in *Blakely* does not affect the sentencing guidelines. The Supreme Court decision in *United States v. Booker* (543 U.S. 220) overturned this part of the ruling in *Hammoud*. Some of the sentencing decisions citing *Hammoud* occurred after Booker and some before. The cases that were decided before Booker (01/12/2005) that deal with sentencing are not included in the data set because *Hammoud* was overturned. Cases that cite *Hammoud* for other reasons are included in the data set since those rulings are still valid. The cases that are excluded from the data set because *Hammoud* was overturned are:

United States v. Ruiz-Gutierrez, 118 Fed. Appx. 765, 2005 U.S. App. LEXIS 214 (4th Cir. W. Va. 2005)

United States v. Fisher, 118 Fed. Appx. 755, 2005 U.S. App. LEXIS 136 (4th Cir. N.C. 2005)

United States v. James, 118 Fed. Appx. 686, 2004 U.S. App. LEXIS 25741 (4th Cir. S.C. 2004)

United States v. Ricketts, 122 Fed. Appx. 4, 2004 U.S. App. LEXIS 25433 (4th Cir. N.C. 2004)

United States v. Sloan, 117 Fed. Appx. 869, 2004 U.S. App. LEXIS 25436 (4th Cir. N.C. 2004)

United States v. Ruffin, 117 Fed. Appx. 239, 2004 U.S. App. LEXIS 25223 (4th Cir. N.C. 2004)

United States v. Shider, 122 Fed. Appx. 1, 2004 U.S. App. LEXIS 25039 (4th Cir. S.C. 2004)

United States v. Lowry, 116 Fed. Appx. 446, 2004 U.S. App. LEXIS 24308 (4th Cir. N.C. 2004)

United States v. Reyes, 114 Fed. Appx. 67, 2004 U.S. App. LEXIS 23439 (4th Cir. Md. 2004)

United States v. Satterfield, 114 Fed. Appx. 545, 2004 U.S. App. LEXIS 23313 (4th Cir. N.C. 2004)

United States v. Lane, 114 Fed. Appx. 543, 2004 U.S. App. LEXIS 23025 (4th Cir. W. Va. 2004)

United States v. Coates, 113 Fed. Appx. 520, 2004 U.S. App. LEXIS 22957 (4th Cir. W. Va. 2004)

United States v. Hadden, 112 Fed. Appx. 907, 2004 U.S. App. LEXIS 22757 (4th Cir. S.C. 2004)

United States v. Goforth, 112 Fed. Appx. 897, 2004 U.S. App. LEXIS 22761 (4th Cir. N.C. 2004)

United States v. Brooks, 111 Fed. Appx. 701, 2004 U.S. App. LEXIS 22490 (4th Cir. Va. 2004)

United States v. Courtright, 111 Fed. Appx. 695, 2004 U.S. App. LEXIS 22486 (4th Cir. W. Va. 2004)

United States v. Atkins, 112 Fed. Appx. 273, 2004 U.S. App. LEXIS 22094 (4th Cir. Va. 2004)

United States v. Eaddy, 110 Fed. Appx. 349, 2004 U.S. App. LEXIS 21291 (4th Cir. S.C. 2004)

United States v. Robinson, 111 Fed. Appx. 154, 2004 U.S. App. LEXIS 20660 (4th

Cir. Md. 2004)

United States v. Salazar-Acuna, 109 Fed. Appx. 626, 2004 U.S. App. LEXIS 20809 (4th Cir. N.C. 2004)

United States v. Greene, 108 Fed. Appx. 814, 2004 U.S. App. LEXIS 20646 (4th Cir. W. Va. 2004)

United States v. Hernandez, 109 Fed. Appx. 563, 2004 U.S. App. LEXIS 19723 (4th Cir. Va. 2004)

United States v. Jackson, 109 Fed. Appx. 550, 2004 U.S. App. LEXIS 19425 (4th Cir. W. Va. 2004)

United States v. King, 113 Fed. Appx. 504, 2004 U.S. App. LEXIS 19352 (4th Cir. S.C. 2004)

United States v. Biheiri, 341 F. Supp. 2d 593, 2004 U.S. Dist. LEXIS 21424 (E.D. Va. 2004) (note that there is another Biheiri case in the data set that cites Hammoud for sentencing reasons other than this 6th Amendment issue).

State v. Mitchell, 687 N.W.2d 393, 2004 Minn. App. LEXIS 1154, 8 No. 42 Minn. Lawyer 25 (2004)

United States v. Hossein Afshari, 426 F.3d 1150, 2005 U.S. App. LEXIS 22517 (9th Cir. Cal. 2005) was coded in the data set, but *United States v. Afshari*, 412 F.3d 1071, 2005 U.S. App. LEXIS 11556 (9th Cir. Cal. 2005) and *United States v. Afshari*, 392 F.3d 1031, 2004 U.S. App. LEXIS 26430 (9th Cir. Cal. 2004) were not. The three cases are essentially the same case with similar wording. Only one instance of this case was included in the data set.

United States v. Mouzone, 696 F. Supp. 2d 536, 2009 U.S. Dist. LEXIS 100718 (D. Md. 2009) was not included in the data set. This is a recommended decision from a magistrate court judge. I could not find where this decision was adopted by the district court.

United States v. Aref, 2007 U.S. Dist. LEXIS 17919 (N.D.N.Y Mar. 14, 2007) is not included in the data set. It is extremely similar (almost word for word the same) as *United States v. Aref*, 2007 U.S. Dist. LEXIS 17926 (N.D.N.Y Mar. 14, 2007) which was handed down by the same judge on the same day. Both of these cases are listed as following United States v. Arnaout.

APPENDIX C

DECSRIPTION OF COURT SYSTEM

A short discussion of the judicial system in the United States may help to understand how precedents impact the development of the law. The judicial system has two distinct level of the legal system: the federal system and state systems. The state judiciary is made up of state and local courts with appellate courts and normally one supreme state court. State court system can vary by state and are established by the state governments to hear cases and controversies. State courts include both trial courts to hear the merits of an actual case and appellate courts to hear appeals from trial decisions. State courts can hear both civil and criminal cases.

The federal judicial system is made up of different levels just like state courts. District courts are the trial courts in the federal system and there are ninety-four federal districts in the United States with at least one district in each state (www.uscourts.gov). Cases heard at the district level are normally heard by one judge although the district judge may defer a hearing to a magistrate court. After the finding of the magistrate court, the district court may either adopt the finding of the magistrate court or create a finding of its own. The ninety-four district courts are arranged into twelve circuits each with an appeals court to hear an appeal from a district court. The appeals court is known as a circuit court or federal circuit court of appeals. The circuits are arranged geographically across the United States. The only court level above the court of appeals level is the United States Supreme Court which consists of one court.

It is also important to note the case load of the courts in discussing research on lower courts and the Supreme Court. While the Supreme Court on average hears less than 100 cases a year, the circuit courts of appeals hears nearly 60,000 cases a year (Hettinger, Lindquist, and Martinek 2007). The Supreme Court has a mostly discretionary docket where they chose which cases to take. The federal circuit courts have a mandatory docket effectively making the court of appeals the last level of appeal and the final say on most cases. While the judges on the courts of appeals are still affected by many of the same influences as Supreme Court justices, their heavy case load and mandatory docket means they are likely to hear many cases on the same subject matter rather than the complex and unsettled cases that heard by the Supreme Court.

APPENDIX D

NEGATIVE BINOMIAL REGRESSION MODEL

Variable	Positive Treatment
Pro-government	0.43***
	(0.07)
Age	-.02
	(0.04)
Age Squared	-0.01
	(0.01)
Vitality	0.01
	(0.01)
En Banc	-0.04
	(0.33)
Unanimous	-0.19
	(0.19)
Inside Circuit	0.05
	(0.07)
Lag Variable	0.18
	(0.10)
Constant	-0.70
	(0.25)
N	399
Log Likelihood	-341.870
Pseudo R^2	0.32

*Significant at p<0.10 **Significant at p<0.05 ***Significant at p<0.01

Table 6.5 reports results using a negative binomial regression model. This model was used to compare the results to ensure consistency with the logit models reported earlier. The logit model shows that variable for the progeny decision favoring the government is significant in determining the favorable treatment of the precedent. The dependent variable for this model is the number of precedents treated positively each year after the precedent was created. Each variable represents the number of times that variable occurred in the precedent year. For example, the progov variable is the number of cases in a given year that are decided in favor of the government of the cases that positively or negatively treat the precedent. The En Banc variable lists the number of en banc cases in a given year of the cases treated a precedent positively or negatively. The Lag Variable is used to account for possible autocorrelation over time. The results of this model are consistent with the logit models.

APPENDIX E

CORRELATION MATRIX

Terrorism Data Set

	Pos/Neg Treatment of Precedent	Pro-Government	Precedent Pro-Government	Time Since Precedent (Days)	Time Since Precedent $(Days)^2$	Ideological Distance	Deference to Lower Court	Government Appellant	Vitality	Parent Decision Unanimous	Parent Decision En Banc	Inside Circuit	State
Pos/Neg Treatment of Precedent	1												
Pro-Government	0.335	1											
Precedent Pro-Government	0.128	-0.044	1										
Time Since Precedent (Days)	-0.0068	0.014	0.105	1									
Time Since Precedent $(Days)^2$	-0.057	-0.022	0.077	0.916	1								
Ideological Distance	-0.06	-0.041	-0.008	-0.026	-0.029	1							
Deference to Lower Court	0.276	0.695	0.046	0.036	-0.032	-0.048	1						
Government Appellant	0.002	0.021	-0.064	-0.068	-0.003	0.019	-0.467	1					
Vitality	0.106	0.057	0.045	0.124	-0.009	0.002	0.111	-0.001	1				
Parent Decision Unanimous	-0.069	0.021	-0.129	0.237	0.2	0.035	0.084	-0.157	-0.013	1			
Parent Decision En Banc	0.004	-0.029	0.056	-0.097	-0.092	-0.079	0.003	0.011	-0.073	-0.438	1		
Inside Circuit	0.042	-0.043	0.071	-0.062	-0.052	-0.008	0.021	-0.044	-0.011	-0.028	-0.221	1	
State	0.082	0.043	0.042	0.0433	0.045	-0.065	0.014	0.021	-0.039	0.022	-0.009	-0.271	1

Drug Data Set

	Pos/Neg Treatment of Precedent	Pro-Government	Precedent Pro-Government	Time Since Precedent (Days)	Time Since Precedent $(Days)^2$	Ideological Distance	Deference to Lower Court	Government Appellant	Vitality	Parent Decision Unanimous	Parent Decision En Banc	Inside Circuit	State
Pos/Neg Treatment of Precedent	1												
Pro-Government Precedent	-0.041	1											
Pro-Government	0.224	-0.028	1										
Time Since Precedent (Days)	0.125	0.082	-0.105	1									
Time Since Precedent $(Days)^2$	0.109	0.089	-0.125	0.966	1								
Ideological Distance	-0.034	-0.109	0.058	0.059	0.052	1							
Deference to Lower Court	0.092	0.627	0.115	0.107	0.104	-0.121	1						
Government Appellant	-0.132	-0.119	-0.092	0.002	-0.013	0.097	-0.336	1					
Vitality	-0.064	0.009	-0.114	-0.075	-0.073	-0.041	-0.071	0.101	1				
Parent Decision Unanimous	-0.118	0.07	-0.3	0.251	0.231	0.034	0.004	0.007	0.025	1			
Parent Decision En Banc	0.097	-0.006	0.251	-0.266	-0.23	-0.017	0.022	0.003	-0.001	-0.836	1		
Inside Circuit	0.246	-0.085	0.112	0.061	0.045	-0.069	0.072	-0.141	-0.035	0.022	-0.105	1	
State	0.007	0.033	-0.007	0.116	0.087	-0.039	-0.036	0.136	-0.099	0.039	-0.05	-0.387	1