



The Record of Samuel Alito: A Preliminary Review

October 31, 2005

This preliminary report provides a summary of Judge Samuel Alito's professional record. In compiling this document, we have focused primarily on those opinions, concurrences and dissents which were authored by Judge Alito himself and provide important insight about his record concerning important issues of fundamental rights and liberties. For the most part, we have limited the subject matters we examined to those cases dealing with civil rights and individual liberties. In a few areas we have supplemented our review by providing excerpts from news stories which provide additional details and information. This overview report is not limited only to cases in which People For the American Way disagrees with Judge Alito's reasoning; the inclusion of cases for informational purposes does not indicate that PFAW has taken a formal position on the case or the issues at stake.

Overview:

As the following summaries of his opinions reveal, the judicial philosophy of Samuel Alito is far to the right. In fact, he has been given the nickname "Scalito" by some who practice before him and liken him to U.S. Supreme Court Justice Antonin Scalia. He has demonstrated hostility toward the principles undergirding a woman's constitutionally protected right to govern her own reproductive choices – most notably in the Third Circuit's attempt to limit or overturn *Roe v. Wade* in the context of the *Planned Parenthood v. Casey* case. In addition, he has issued a number of troubling opinions that seek to undermine established civil rights law, especially in the areas of gender and race, and that seek to severely limit the federal government's ability to protect its citizens. Alito claimed that the federal government could not apply the Family and Medical Leave Act to state employees, a decision effectively reversed by the Supreme Court, and even argued that Congress could not enact a ban on the possession of machine guns. It is clear that Alito's confirmation would seriously jeopardize Americans' rights.

Background:

Judge Alito was born in 1950 in Trenton, New Jersey. He graduated from Princeton University in 1972 and Yale Law School in 1975. From 1976 to 1977 he served as a law clerk for Judge Leonard A. Garth of the U.S. Court of Appeals for the Third Circuit. From 1977 to 1981 he was an Assistant U.S. Attorney for the District of New Jersey. In 1981 he joined the Reagan Justice Department. From 1981 to 1985 he served as an Assistant to the U.S. Solicitor General and from 1985 until 1987 he was a Deputy Assistant U.S. Attorney General. From 1987 until 1990 he served as the U.S. Attorney for the District of New Jersey and in 1990 he was nominated by George Bush to the U.S. Court of Appeals for the Third Circuit. He was confirmed by the Senate on April 27, 1990.

Privacy Rights and Reproductive Freedom:

Alito's opinions on abortion and reproductive choice are very troubling. When the Third Circuit upheld most of Pennsylvania's very restrictive anti-abortion law in 1991 in *Casey*, Alito wrote separately to say that he would have upheld the whole law, including restrictions requiring a woman to notify her spouse before obtaining an abortion. The Supreme Court majority disagreed with Alito, but justices who sought to overrule *Roe v. Wade* agreed with his view. This case raises key questions about whether, if confirmed to a seat on the Supreme Court, Alito would be a vote for overturning *Roe v. Wade*.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

In the late 1980's, the Pennsylvania state legislature passed a number of amendments to the Pennsylvania Abortion Control Act of 1982 which placed restrictions on the right of women to obtain an abortion. For example, the amendments required: 1) women to wait for 24 hours after being given certain information about abortion before undergoing the procedure; 2) minors to obtain parental consent or a judicial bypass; 3) women to inform their spouses of their decision to seek an abortion except in very narrow circumstances; 4) reporting requirements for abortion clinics and public disclosure of those reports. The district court found that all of these provisions were unconstitutional, and the state appealed.

On appeal, a three-judge panel of the Third Circuit, including Judge Alito, reversed the district court on every issue except the spousal notification provision, which two of the judges, not including Alito, held unconstitutional. Specifically, the panel found that none of the provisions -- except spousal notification -- subjected women seeking abortions to an undue burden. A majority of the panel agreed that the spousal notification provision did pose an undue burden on women seeking an abortion and was unconstitutional. As one legal expert stated in characterizing the panel decision, "[f]or the first time since 1973, a Federal court of appeals has directly said that *Roe v. Wade* is no longer the law of the land." *Appeals Court Upholds Limits for Abortions*, by Michael deCourcy Hinds, *The New York Times*, 10/22/91, p. A1 (quoting Kathryn Kolbert of ACLU Reproductive Freedom Project who argued the case for Planned Parenthood).

Alito went even further and dissented in part because he felt that none of the provisions, even the spousal notification provision, posed an undue burden on women seeking abortions. Alito argued that any minimal burden posed by the spousal notification provisions was justified by Pennsylvania's legitimate interest in furthering the husband's interest in the fetus carried by his wife. Part of Alito's decision appeared to rest on the fact that, according to him, those challenging the provision "failed to show even roughly how many of the women in this small group would actually be adversely affected by" the spousal notification provisions. 947 F.2d at 722. Since no undue burden was imposed by the statute, argued Alito, the regulation needed only to meet a lower level of scrutiny. Given the state's legitimate interest, Alito believed the spousal notification requirement was constitutional. This dissenting view demonstrates Alito's extremely narrow construction of what constitutes an undue burden on a woman's right to obtain an abortion.

After the Third Circuit decision came down, there were a number of press reports about the holding. One article in *The New York Times* made it clear that the *Casey* decision had enormous legal and practical implications on privacy rights and reproductive freedom:

A Federal appeals court today upheld most provisions of Pennsylvania's abortion law, one of the strictest in the nation, and set the stage for an appeal to the Supreme Court

that could provide the first direct test of the 1973 *Roe v. Wade* decision establishing the right to an abortion....

Legal experts say the Third Circuit's decision today is essentially a reasoned guess on how the Supreme Court would have ruled on the Pennsylvania law, perhaps motivated by the Third Circuit's desire not to have its decision overturned by the High Court....

Denise Neary, executive director of the Pennsylvania Pro-Life Federation, in Scranton, said: "I'm obviously delighted. The court upheld everything except spousal notification. The bottom line is that *Roe v. Wade* is doomed."

Appeals Court Upholds Limits for Abortions, by Michael deCourcy Hinds, *The New York Times*, 10/22/91, p. A1.

Ultimately, a majority of the Supreme Court reaffirmed the essential holding of *Roe v. Wade*, while substantially affirming the Third Circuit's majority opinion. Still, four of the most conservative justices of the Supreme Court (including Scalia and Thomas) wrote that they wanted to revisit and overturn *Roe v. Wade*. These same justices approvingly quoted Alito's argument in favor of the spousal notification provision in their opinion. *Planned Parenthood v. Casey*, 505 U.S. 833, 974-75 (1992).

Planned Parenthood of Central New Jersey v. Farmer, et. al., 220 F.3d 127 (3d Cir. 2000).

During the late 1990's a number of different courts across the nation considered the constitutionality of state laws purporting to limit the constitutionally intact dilation and extraction procedures sometimes referred to by opponents as "partial birth abortion." The Third Circuit considered such a law in New Jersey. After the Third Circuit opinion was drafted, but before it was issued, the Supreme Court issued its opinion in *Stenberg v. Carhart* (530 U.S. 914 (2000)) which struck down a late term abortion law very similar to the one at issue in New Jersey. As the Third Circuit had already determined that the law was unconstitutionally vague, they issued their opinion written by Judge Maryanne Trump Barry unchanged except to note, in the beginning of the opinion, the intervening opinion of the U.S. Supreme Court. The opinion is a lengthy discussion of the constitutional inadequacies of the New Jersey statute. Alito wrote separately to state that he believed that the whole majority opinion was "never necessary and is now obsolete." 220 F.3d at 152. He would have preferred that the court simply hold that the New Jersey statute was unconstitutional because it did not contain an exception for situations in which the health of the mother was endangered as required by the Supreme Court in *Stenberg v. Carhart* and because the statute would have applied to more than just intact dilation and extraction.

Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997), *cert. denied*, 522 U.S. 949 (1997).

In 1992, Karen Alexander was admitted to the hospital at eight and one-half months pregnant to give birth to her child. Just before delivery by cesarean section, the child's vital signs appeared to be normal, but sadly the child was stillborn. Ms. Alexander and her lawyers sued the state of New Jersey. Their main argument was that the wrongful death and survival action laws in New Jersey were unconstitutional because they do not allow for recovery against negligent doctors and other medical personnel for a fetus who dies before birth. The district court dismissed the case and a three-judge panel of the Third Circuit affirmed the lower court's decision. The court's opinion made clear that *Roe v. Wade*, and the reproductive choice cases that followed, explicitly found that an unborn child is not a "person" cognizable under the constitution. Therefore, the court reasoned, none of the due process and equal protection claims available to people who had been born were available to, or on behalf of, an unborn fetus. Alito

wrote a very brief concurrence, which is ambiguous as to his views on *Roe v. Wade*. In his concurrence he states that he is “in almost complete agreement” with the majority opinion. He writes separately to make the following comments:

I think the court’s suggestion that there could be ‘human beings’ who are not ‘constitutional persons’ is unfortunate. I agree with the essential point that the court is making: that the Supreme Court has held that a fetus is not a ‘person’ within the meaning of the Fourteenth Amendment. However, the reference to constitutional non-persons, taken out of context, is capable of misuse.

114 F.3d at 1409 (*citations omitted*). Alito also went out of his way to note that there is a strong history of not treating unborn children as persons. He wrote: “I think that our substantive due process inquiry must be informed by history. It is therefore significant that at the time of the adoption of the Fourteenth Amendment and for many years thereafter, the right to recover for injury to a stillborn child was not recognized.” *Id.* (*citations omitted*).

Doe v. Groody, 361 F.3d 232 (3d Cir. 2004), *cert. denied* 125 S. Ct. 111 (2004).

Pursuant to a warrant, police officers carried out a search of the home of a man suspected of drug dealing. While they were there, they encountered the suspect’s wife and ten-year-old daughter. The police decided to strip-search the wife and daughter, although they were not mentioned in the warrant. The Does sued for invasion of privacy. The officers argued that they were entitled to qualified immunity because they had not violated a clearly established constitutional right. The district court held in favor of the Does, and a divided three-judge panel of the Third Circuit affirmed. Alito dissented, arguing that the warrant could be read to authorize a search on anyone on the premises and that “even if the warrant did not contain such authorization, a reasonable police officer could certainly have read the warrant as doing so, and therefore the appellants are entitled to qualified immunity.” *Id.* at 244.

Civil Rights and Discrimination:

Alito’s decisions on civil rights raise a number of troubling questions about his commitment to strong enforcement of the nation’s laws intended to protect people from discrimination. In a number of instances, Alito issued opinions that made it far more difficult for victims of discrimination to get to court and prove their cases. Alito’s decisions appear to be especially harsh in the areas of gender and race discrimination, where he has dissented from Third Circuit decisions and sought to make it much harder for victims of race and sex discrimination to prove discrimination.

Gender Discrimination:

Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061 (3d Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997).

Ms. Sheridan was a “Head Captain” in a hotel owned by DuPont. She sued for sex discrimination and other claims when DuPont failed to promote her to the higher position of “Manager of Restaurants.” DuPont asked the court to throw the case out without a trial, alleging that Sheridan had presented insufficient evidence to warrant a trial. The district court rejected DuPont’s motion and the case went to trial. While the various facts of this case and its procedural history are very complex, the main issue for the Third Circuit involved questions about how much evidence a person alleging discrimination must show in order to get their case to trial. This issue is one on which the various circuit courts have been divided for some time

despite at least two Supreme Court cases attempting to resolve the issue. The majority of the entire Third Circuit, sitting *en banc*, endorsed a standard which makes it easier for someone alleging discrimination to present sufficient evidence to get their case to trial, a decision more or less in line with the majority of other Circuits. Alito was the sole dissenter from this decision, however, and argued that he would, in some cases, require victims of discrimination to present much more evidence before they would be entitled to take their case to trial. Were this position adopted more broadly it would make it much more difficult for victims of discrimination to get to court and to prove their case.

Watson v. SEPTA, 207 F.3d 207 (3d Cir. 2000), *cert. denied*, 531 U.S. 1147 (2001).

Jacqueline Watson was injured on the job for the Southeastern Pennsylvania Transportation Authority (“SEPTA”). Initially, SEPTA made accommodation for the disability that resulted from her injury, but eventually they gave her job to a non-disabled male. Watson sued SEPTA for discrimination based both on sex and disability. A jury decided the case in SEPTA’s favor, and Watson appealed to the Third Circuit claiming that the judge had improperly instructed the jury on how to resolve Watson’s claim of sex discrimination. In writing his decision for the three-judge panel, Alito considered similar cases from different circuits and chose an interpretation of the law endorsed by some circuits and rejected by others. The interpretation chosen by Alito construed the law in such a way that makes it more difficult for certain victims of discrimination in the Third Circuit to win their law suits, although Alito did allow the plaintiff in this case to recover some of her costs from the defendant.

Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997).

Officer Robinson complained of sexual harassment by her supervisor, Officer Dickerson, consisting of “unhooking her bra, snapping her bra strap, touching her hair and ears, telling her ‘you stink pretty,’ making comments about the size of her breasts, blowing her a kiss, asking her out for a drink, touching her leg under a table, putting his hands around her waist, dropping his keys down the back of her shirt and attempting to retrieve them, and describing the position in which he and Robinson would have sex if they were to do so.” 120 F.3d at 1291. Robinson complained to Assistant Chief Edwards (who did not have direct authority over Dickerson) and also applied for a transfer to the detective bureau (which would have been a promotion). Edwards advised Robinson to “wait it out” because he thought that Chief Buford, who did have authority over Dickerson, protected Dickerson. *Id.* But he told Robinson that Buford might be leaving the job soon and potentially taking Dickerson with him. Edwards also told Robinson that Dickerson “had done this before” and that Buford had taken no action. *Id.* Robinson submitted a written request (which did not mention the harassment) for an appointment with Buford but she was refused. Finally, Robinson filed a complaint with her supervisor, the EEOC and the Bureau of Police Office of Professional Standards (“OPS”). The OPS investigation “concluded that there was probable cause to substantiate Robinson’s claim.” *Id.* at 1292. Soon thereafter Robinson stopped reporting to work and did not return. Four months after she left she was promoted to sergeant.

Robinson sued the City, Buford, Edwards and Dickerson for sexual harassment and sex discrimination and sued Dickerson for assault, battery and intentional infliction of emotional distress. At the district court level Robinson lost on most of her claims and Robinson appealed. In an opinion written by Alito, the Third Circuit agreed with the district court that Robinson’s claim that Assistant Chief Edwards knew about and acquiesced in her harassment was invalid because Edwards did not have direct supervisory control over Dickerson, and Alito held that Buford was not liable because there was insufficient evidence – despite Edwards’ knowledge –

that Buford knew of the harassment. Alito also rejected Robinson's claim that she suffered retaliation after she filed her complaints. In rejecting Robinson's claims on these two points, Alito applied very stringent standards of proof that would be difficult for many victims of discrimination to meet. Alito also demonstrated a striking lack of awareness about the problem of sexual harassment when he upheld the lower court's exclusion of a report that showed that Dickerson had previously harassed another woman. In a footnote, Alito wrote:

Finally, Robinson challenges the court's refusal to admit the report prepared by the City's Office of Professional Responsibility that found that Dickerson had created an "uncomfortable" work environment for another woman. The court allowed Robinson to elicit the report's conclusions as admissions by the City, but excluded the report itself as irrelevant. Robinson contends that the report shows notice to the City of Dickerson's alleged harassment of her. We find no error here as well. The conduct on the part of Dickerson discussed in the report is not his alleged harassment of Robinson, so the report in no way put the City on notice that Dickerson was harassing Robinson.

120 F.3d at 1306. Alito did, however, find that a jury should decide whether or not Dickerson had prevented Robinson from obtaining a transfer to the detectives bureau because she refused his advances.

Racial Discrimination:

Bray v. Marriott Hotels, 110 F.3d 986 (3d Cir. 1997).

Ms. Bray, an African-American woman, applied for a promotion but a white woman was hired for the job instead. Her employer, Marriott, did not follow its own guidelines for hiring and several of the key employees involved in the process gave conflicting statements about how the decision to hire the white woman was ultimately made. Bray sued, and the district court ruled for Marriott, holding that Bray had not presented a strong enough case to go to trial. Bray appealed, and a divided three-judge panel of the Third Circuit overturned the district court, holding that Bray should be able to make her case to a jury. Alito dissented from the panel's decision and would have thrown out Bray's case. In his dissent Alito made clear that he would have imposed an almost impossible evidentiary burden on victims of employment discrimination. As the majority opinion noted:

We do not believe that Title VII analysis is so tightly constricted. This statute must not be applied in a manner that ignores the sad reality that racial animus can all too easily warp an individual's perspective to the point that he or she never considers the member of a protected class the 'best' candidate regardless of that person's credentials. The dissent's position would immunize an employer from the reach of Title VII if the employer's belief that it had selected the 'best' candidate, was the result of conscious racial bias. Thus the issue here, is not merely whether Marriott was seeking the 'best' candidate but whether a reasonable factfinder could conclude that Bray was not deemed the best because she is Black. Indeed, Title VII would be eviscerated if our analysis were to halt where the dissent suggests.

110 F.3d at 993.

Alito's dissent demonstrates skepticism about the legitimacy of some discrimination claims. He closed his dissent with the following disturbing pronouncement:

I have no doubt that in the future we are going to get many more cases where an employer is choosing between competing candidates of roughly equal qualifications and the candidate who is not hired or promoted claims discrimination. I also have little doubt that most plaintiffs will be able to use the discovery process to find minor inconsistencies

in terms of the employer's having failed to follow its internal procedures to the letter. What we end up doing then is converting anti-discrimination law into a 'conditions of employment' law, because we are allowing disgruntled employees to impose the costs of trial on employers who, although they have not acted with the intent to discriminate, may have treated their employees unfairly. This represents an unwarranted extension of the anti-discrimination laws.

Id. at 1003.

Glass v. Philadelphia Electric Company, 34 F.3d 188 (3d Cir. 1994), *reh'g en banc denied*, 1994 U.S. App. LEXIS 27782 (3d Cir. 1994).

Mr. Glass worked for the Philadelphia Electric Company (PECO) for 23 years during which time he received only one job evaluation that was less than satisfactory, covering a two-year period from 1984 to 1986. Throughout his career with PECO, Glass was a strong advocate for workers, especially black workers. After obtaining two degrees in engineering, Glass applied for several promotions to new positions and each time he was rejected. Moreover, some positions for which he would have liked to apply were never posted by the company. In 1990 Glass sued for race and age discrimination and for retaliation. During trial, PECO presented evidence suggesting that Glass had not been promoted to the more desirable positions at least in part because of the negative evaluation he had received in 1984-86. When Glass tried to explain these below par job evaluations by presenting evidence that he had been subject to racial harassment and a hostile work environment during that time, the trial judge did not allow him the opportunity to rebut the employer's derogatory allegations.

On appeal, a divided three-judge panel of the Third Circuit reversed the trial court and held that Glass should have been allowed to present his evidence to the jury. Alito dissented, arguing that allowing Glass to tell his side of the story about the 1984-86 period might cause "substantial unfair prejudice." 34 F.3d at 200. Alito also argued that even if Glass' evidence should have been admitted, the trial judge's abuse of discretion was "harmless." *Id.* at 201.

Grant v. Shalala, 989 F.2d 1332 (3d Cir. 1993), *reh'g denied*, 1993 U.S. App. LEXIS 7466 (3d Cir. 1993).

A class of people who felt that they had been the victims of racial, class and other bias by Administrative Law Judge (ALJ) Rowell in the process of appealing benefit denials by the Social Security Administration (SSA) sued the Secretary of the Department of Health and Human Services. The district court was prepared to hold a trial on the issue, but the government was granted an interlocutory appeal to a three-judge panel of the Third Circuit, arguing that the district court should not be permitted to review the government's fact-finding analysis which resulted in a determination that the judge had exhibited no bias. In an opinion by Alito, a majority of the panel agreed with the government and held that the courts should not second-guess the governments' fact-finding. But the Alito opinion did make clear that it was expressing "no view regarding the correctness of the administrative findings or the adequacy of the special panel's inquiry..." 989 F.2d at 1346. The majority also noted that the district court could remand the case back to the government for additional fact-finding.

In a strong dissent, Judge A. Leon Higginbotham sharply criticized the statutory and case law analyses provided by the majority. In his conclusion, Judge Higginbotham wrote:

What the majority proposes to do in its holding is effectively to have courts take a back seat to bureaucratic agencies in protecting constitutional liberties. This -- even if the majority couches it in terms of administrative efficiency and expertise -- is a radical and unwise redefinition of the relationship between federal courts and federal agencies, likely

to have an effect far beyond the question of the standard of review exercised by federal courts in collateral actions alleging unlawful bias on the part of a social security administrative law judge.

989 F.2d at 1359.

After the Third Circuit refused a request to rehear the case, the district court remanded the case to the Secretary of Health and Human Services for additional fact-finding. After the fact-finding had been completed, the government again determined that ALJ Rowell had not been biased. The district court noted that the government came to this conclusion despite extremely damning evidence presented by two individuals who had worked for the SSA. One of these individuals was an attorney advisor who had worked closely with and had become close friends with ALJ Rowell. The court explained that this advisor testified that black and Hispanic claimants were more likely to be classified by Rowell as “no-goodniks” and have their claims denied. *Grant v. Commissioner, SSA*, 111 F. Supp. 2d 556, 559 (M.D. PA 2000). He testified that Rowell believed that Hispanics would “fake mental illness” and an inability to understand English, used the word “nigger,” and mentioned a Senator Bilbow who allegedly introduced a bill in Congress calling for the return of all African-Americans to Africa. 111 F. Supp. 2d at 559-60 (*citations omitted*). Based on this and a good deal of other evidence, the district court ruled that the Secretary’s decision had not been supported by substantial evidence and that ALJ Rowell had indeed been biased. The Social Security Administration was ordered to schedule and conduct new administrative hearings on the disability benefits claims of the plaintiffs.

Ramseur v. Beyer, 983 F.2d 1215 (3d Cir. 1992), *cert. denied*, 508 U.S. 947 (1993).

Mr. Ramseur challenged his criminal conviction based on alleged racial discrimination during the grand jury selection process. While Ramseur challenged several components of the jury selection procedure, the court focused on one aspect of the process involving the actions of an assignment judge. According to the record, while picking the jury, the assignment judge announced that he was trying to “pick a cross section of the community.” 983 F.2d at 1222. Apparently, in attempting to achieve this goal, the assignment judge did not randomly seat potential jurors but instead asked some jurors, including at least two African-American potential jurors, to sit separately in the body of the courtroom for a period of time before they were later asked to join the panel. While the majority opinion in the case did not elaborate on the rationale for the judge’s course of action, the three-judge dissent stated that “[t]he procedure employed by the assignment judge – of temporarily excluding qualified African-American grand jurors and allowing them to serve only on condition that whites were unavailable – does violence to the principle of equal protection and can only undermine public confidence in the justice system.” *Id.* at 1246. Despite this pointed critique by three dissenting judges, the majority of the Third Circuit ruled against Mr. Ramseur.

Alito wrote a separate concurring opinion to make clear that he would have reached the same result as the majority albeit with somewhat different reasoning. First Alito relied heavily on the conclusion of the majority (questioned by the dissent) that no juror was actually excluded on the basis of race. Second, Alito expressed his opinion that a defendant may not have any constitutional basis to challenge a grand jury when certain racial groups were treated differently only in order to mirror the community (a “cross-section” jury). Alito conceded that, if Ramseur had succeeded in proving that any juror had been excluded based on race, his logic might have been seen to conflict with Supreme Court precedent which makes clear that any discrimination in the selection of juries is unacceptable. However, Alito was dismissive of some of the Supreme Court’s prior pronouncements in this area with respect to this case. He implied that he had no obligation to consider these pronouncements, calling them “technically dicta,” and considering

them inapplicable to this case. *Id.* at 1243. Finally, Alito concluded that despite the Supreme Court’s ruling that defendants may be able to assert the rights of trial jurors who are victims of discrimination, the same is not true with respect to grand jury jurors.

Pemberthy v. Beyer, 19 F.3d 857 (3d Cir. 1994), *reh’g denied*, 19 F.3d 857, 873 (3d Cir. 1994), *cert. denied*, 513 U.S. 969 (1994).

Pemberthy and Moncada were convicted in state court of various drug offenses at a trial in which a key issue involved English translations of Spanish-language testimony and wiretapped conversations. At their trial the prosecution used “peremptory strikes” – a method by which prosecutors may remove jurors without explanation – to remove five jurors who spoke Spanish from sitting on the jury. After they had been tried and sentenced, Pemberthy and Moncada challenged their convictions arguing that striking Spanish-speakers from the jury had been a pretext for striking Latinos from the jury. The prosecution responded that their strikes had been motivated by their concern that those who spoke Spanish might be less able to rely on translations as opposed to their own interpretation of Spanish testimony and transcripts. The state appellate court denied Pemberthy and Moncada’s motion, finding that the peremptory challenges were not based on race but instead on issues related to the use of translations of taped Spanish conversations as evidence in the case. On review, the federal district court ruled for Pemberthy and Moncada and found that the striking of Spanish-speaking jurors represented an unconstitutional exclusion of jurors based on race or national origin.

On appeal, in an opinion written by Alito, the Third Circuit reversed the decision of the district court. Alito found that Pemberthy and Moncada had not shown that the prosecution’s decision had been motivated by race or national origin and that the district court should have adhered to the findings of the state court. Alito’s opinion reveals that he was swayed by a number of points. First he noted that according to his findings, two of the five Spanish-speakers who were excluded from the jury were not Latino. He also noted that at the time the jurors were excluded, there were no Supreme Court opinions barring peremptory challenges based on race or ethnicity, and that neither state nor federal law prohibited using peremptory strikes to remove jurors of specific races. According to Alito this meant that the prosecution had no need to construct the pretext of language to justify removing the jurors. Alito also found persuasive the prosecution’s stated concern about jurors’ ability to consider only the court-sanctioned translations in coming to their decision in the case. This ruling raises troubling issues about how Alito would treat language minority jurors in any aspect of a case in which official translations were used.

Riley v. Taylor, 237 F.3d 300 (3d Cir. 2001), *vacated and reh’g en banc granted*, 237 F.3d 348 (3d Cir. 2001), *rev’d*, 277 F.3d 261 (3d Cir. 2001).

In May of 1982, James Riley, an African-American, was indicted for felony murder. He pled not guilty on all counts and was tried, convicted and sentenced to death by an all white jury. After several unsuccessful post-conviction motions and appeals, Riley filed a motion in federal court to challenge his conviction. He raised numerous grounds to support his motion including a charge that jurors were impermissibly struck from the jury based on their race, that he had been disadvantaged by ineffective, appointed counsel, and that the jury had been misled about their role in applying the death penalty. The district court denied Riley’s motion on all grounds and Riley appealed.

Initially, in an opinion authored by Alito, a divided three-judge panel agreed with the district court and thus denied Riley’s claims. Alito determined that none of Riley’s arguments had any merit whatsoever. Judge Sloviter, in dissent, strongly disagreed because she found

plausible Riley's contention that the prosecution had excluded African-American jurors based on their race and that the prosecution had misled the jurors about their role in imposing the death penalty. Specifically she wrote: "The considerable deference that we are obliged to give to state court findings of fact does not require that we give uncritical acceptance to a prosecutor's story merely because a state judge accepted it when the story cries out for skepticism and is inherently improbable. ... I dissent from the majority opinion because I believe the record in this case compels the conclusion that the prosecution in pursuing its express goal of 'mak[ing] sure that James Riley received the death penalty,' violated Riley's constitutional rights..." 237 F.3d 300 (3d Cir. 2001) (citations omitted).

Ultimately the entire Third Circuit reconsidered Riley's appeal. The majority of that court (which was again divided) reversed parts of Judge Alito's previous holding. Again, Judge Sloviter, this time the author of the majority opinion, took strong exception to Judge Alito's arguments. Specifically she found that Riley's rights had been violated with respect to the peremptory strikes against black jurors and with respect to the comments by the prosecutor about the jury's role in applying the death penalty. In one instance, Judge Alito asserted that Riley's statistical evidence showing that the prosecution repeatedly excluded black jurors from juries in capital cases was comparable to an analysis attempting to explain why a disproportionate number of recent U.S. Presidents have been left-handed. 277 F.3d at 327. Judge Sloviter's response is unequivocal: "... the [d]issent's attempt to analogize the statistical evidence of the use of peremptory challenges to strike black jurors to the percent of left-handed presidents requires some comment. The dissent has overlooked the obvious fact that there is no provision in the Constitution that protects persons from discrimination based on whether they are right-handed or left handed. To suggest any comparability to the striking of jurors based on their race is to minimize the history of discrimination against prospective black jurors and black defendants..." *Id.* at 292.

Discrimination Based on Religion:

Fraise v. Terhune, 283 F.3d 506 (3d Cir. 2002).

Members of the Five Percent Nation (FPN) sued the New Jersey Department of Corrections for violations of their First and Fourteenth Amendment rights. The case concerned the prison system's policy of imposing rigid restrictions on prisoners found to be members of Security Threat Groups (STGs). The prison designated the FPN as an STG and thus forbade its members from, among other things, possessing FPN literature despite the fact that an expert at trial testified that "to become a member..., all one need do is study the lessons and aspire to live a righteous life." 283 F.3d at 519. In addition, those designated as core members of the FPN were required under the STG to undergo a behavior modification program in "maximum custody." *Id.* at 511. In order to be released from maximum custody and returned to General Population, core members must "sign a 'Letter of Intention' expressing their intention 'to renounce formally and in spirit affiliation with all Security Threat Groups.'" *Id.* at 524, n3. The other organizations designated as STGs did not purport to be religious groups. Despite all of this, the district court found that the STG policy did not violate the FPN members' free exercise rights under the First Amendment, nor their due process or equal protection rights under the Fourteenth Amendment.

On appeal, in an opinion authored by Alito, a divided three-judge panel of the Third Circuit upheld the district court's opinion. Judge Rendell wrote a strong dissent arguing that the court should have required far more evidence that the FPN was actually a violent group before allowing the imposition of such harsh restrictions on religious exercise.

Discrimination Against People with Disabilities:

Caruso v. Blockbuster-Sony Music Entertainment Ctr., 193 F.3d 730 (3d Cir. 1999).

Caruso, a disabled Vietnam veteran who uses a wheelchair, sued the Blockbuster-Sony Music Entertainment Center (the “E-Centre”) in Camden, New Jersey, for violations of the Americans with Disabilities Act (“ADA”). Caruso made two primary arguments. First, he argued that the E-Centre was required to ensure that people in wheelchairs could see the entertainment even when people lacking disabilities chose to stand to watch a live performance. Second, he argued that the E-Centre was required to provide wheelchair access for the lawn seating area of the entertainment area. In a mixed result for people with disabilities, Alito wrote an opinion for the Third Circuit which held that a Department of Justice regulation did not require people in wheelchairs to be provided with seats allowing them to see over other standing spectators. Despite a ruling to the contrary by the U.S. Court of Appeals for the District of Columbia Circuit, Alito argued that the Department of Justice had not reached “the issue of sightlines over standing spectators,” and thus, the regulations did not cover this claim. 193 F.3d at 736. However, Alito held that Caruso appeared to be correct that the E-Centre would have to provide wheelchair access to the facility’s lawn seats.

Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999).

Ms. Ford worked for Schering-Plough from 1975 until 1992 when she suffered a debilitating mental disorder and was unable to work. The company welfare benefits plan treated physical and mental disabilities quite differently. Under the plan, an employee with a physical disability could receive benefits until the age of sixty-five so long as the disability persisted. Employees with a mental disability, however, could only receive benefits for two years unless they were hospitalized. Ford sued under the Americans with Disabilities Act (ADA) charging, among other things, that she was being subjected to discrimination based upon the type of disability that she had. The district court dismissed Ford’s claim, arguing that since she was no longer able to work she was ineligible to sue under the ADA.

A three-judge panel of the Third Circuit, including Alito, agreed that Ford’s lawsuit should be dismissed. The majority (which did not include Alito) differed with the district court as to whether or not Ford was eligible to file a suit under the ADA. While recognizing that their decision put them at odds with at least two other circuit courts, the two judges writing the court’s opinion held that regardless of whether Ford was eligible to bring suit, they simply found that she had not proven her case. Alito wrote separately to say that he would have not decided the issue of eligibility to sue because he thought the case could be decided on a narrower basis. Nevertheless, he did write: “I do not think that it is necessary for the court to conclude that distinguishing between people with different disabilities for insurance purposes is not discrimination based on disability. In fact, it would seem that making such distinctions does constitute discrimination in the most basic sense of the word.” 145 F.3d at 615 (*citations omitted*).

Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368 (3d Cir. 1991).

In 1984 Jayne Nathanson applied for and was granted admission to the Medical College of Pennsylvania (MCP). Nathanson had several discussions with school officials regarding injuries she had sustained in a car accident and the barriers her injuries posed to pursuing studies at MCP. Nathanson asserted that she made clear to school officials that she would need certain accommodations – chiefly a special chair – in order to participate in the medical school training,

but school officials argued that Nathanson never made her requirements clear. Ultimately Nathanson deferred her acceptance. The parties disagreed as to whether MCP made adequate efforts to accommodate Nathanson so that she could continue her medical education. The record was further confused by the fact that, after deferring her acceptance, Nathanson applied to other medical schools. The parties also disagreed as to whether Nathanson intentionally misrepresented her relationship with MCP in her applications to other medical schools.

Ultimately, Nathanson sued MCP for violations of Section 504 of the Rehabilitation Act of 1973 and for tortious interference with contract. The district court granted MCP's motion for summary judgment – essentially throwing out Nathanson's case. On appeal, a divided three-judge panel of the Third Circuit affirmed the grant of summary judgment on the tortious interference claim, but reversed the district court on the Section 504 claim finding that there were material differences in the assertions of the two sides which required a trial. Judge Alito dissented in part and would have thrown out Nathanson's entire case. He argued that Nathanson had not presented sufficient evidence to show that MCP had failed to adequately accommodate her. In response to Alito's dissent, the majority wrote that "few if any Rehabilitation Act cases would survive summary judgment if such an analysis were applied to each handicapped individual's request for accommodations." 926 F.2d at 1387.

Immigration Issues:

Chang v. INS, 119 F.3d 1055 (3d Cir. 1997).

While we have not conducted an exhaustive review of Alito's decisions in the area of immigration, one opinion raised real concerns about how Alito would deal with foreign nationals seeking asylum in the United States. Mr. Chang was a native of China and an engineer with access to state secrets. In 1992, he led a delegation to the United States. Before leaving China, he was instructed that it was his responsibility to monitor the behavior of the other delegates and report any suspicious behavior to the Chinese Embassy. While he was in the United States, he: . . . violated Chinese law (1) by not reporting to the Chinese authorities the members of his delegation whose misconduct (under the rules set by the Chinese government) suggested they would remain in the United States, (2) by meeting with an FBI agent as arranged by the American company hosting the delegation, and (3) by electing to stay in the United States and to seek asylum after being told by the FBI that he was in 'danger.' 119 F.3d at 1057. In 1994, the INS denied Chang's request for asylum. When Chang requested a hearing, the Immigration Judge again denied his request for asylum and withholding of deportation. The Judge reasoned that the persecution that Chang faced in returning to China was not politically motivated nor sufficiently severe to warrant asylum. The Bureau of Immigration Appeals agreed. A divided panel of the Third Circuit reversed the INS finding that Chang would more likely than not face persecution if he returned to China and thus was entitled to a withholding of deportation. Alito dissented from the panel's decision. Despite the evidence offered by Chang that his wife and son had already faced persecution in China due to Chang's actions and that his own picture had been posted at the local security office, and despite Chang's own personal fear of imprisonment if he returned to China, Alito found no reason to reverse the decision of the INS.

Dia v. Ashcroft, 353 F.3d 228 (3d Cir. 2003)

Saidou Dia, an immigrant from the Republic of Guinea, said that he fled to the United States after he was sought by the military for his work with the opposition and his wife was raped and his house burnt down to intimidate him. He was ordered removed for illegally entering

the United States. He conceded that he had entered the country illegally, but he applied for refugee status due to persecution that he had and would continue to experience in his home country based on his political beliefs. The Immigration Judge (IJ) found that he was not credible and denied his request; her findings were summarily affirmed by the Bureau of Immigration Appeals (BIA). Dia then appealed to the Third Circuit. The *en banc* court held that the “IJ’s analysis of Dia’s credibility was based on reasoning that was at best unexplained and at worst speculative. Accordingly, it was not supported by substantial evidence.” *Id.* at 234. The majority stated that the IJ had misread Dia’s testimony. *Id.* at 252. They further stated that the IJ required documentation from Dia that he would have no way of securing and discounted the evidence that he did produce. *Id.* at 253. They also pointed out that the IJ made numerous conclusions without giving any reason. *Id.* at 254-55. They further indicated that they could not “fathom” why the IJ did not allow Dia’s expert witness to testify. *Id.* at 258. The court declined to find Dia credible, and remanded the case for better assessment and documentation by the IJ. *Id.* at 260-61.

Alito dissented, arguing that the court should not have reviewed the petition at all. *Id.* at 261. He disagreed with the majority assessment that “a reasonable adjudicator could not find that Dia lacked credibility.” *Id.* at 262. He found the IJ’s determination that Dia was not credible reasonable based on the record. *Id.* at 266. The majority noted that Alito’s interpretation would ignore the requirement of substantial evidence, “gut[ting] the statutory standard” and “ignor[ing] our precedent.” *Id.* at 251 n.22. The majority further stated that, contrary to Alito’s reasoning, “we suggest that to require *sound* reasoning breathes life into that standard.” *Id.* at 251.

Lee v. Ashcroft, 368 F.3d 218 (3d. Cir. 2004)

The petitioners in *Lee* had lived in the United States for about twenty years and had grown children who were U.S. citizens. They were convicted of filing false tax returns and sentenced to probation, community service and repayment to the IRS. The INS then started deportation proceedings against them based on a section of the Immigration and Naturalization Act that allows immigrants who have committed “aggravated felonies” to be deported. The IJ found the petitioners to be removable and the BIA affirmed. On appeal, the Third Circuit considered whether filing a false tax return constituted an aggravated felony, concluded that it did not, and vacated the BIA’s ruling. The majority found that Congress clearly only intended tax *evasion* to be a deportable offense under the section. *Id.* at 224-25. Alito dissented, arguing that filing a false tax return was clearly an aggravated felony. *Id.* at 225. The majority countered that the court “must interpret what it has written by well-recognized rules of statutory construction, unaided by speculation.” *Id.* at 225 n.11.

Discrimination Against Older Americans and Other Vulnerable Groups:

Keller v. Orix Credit Alliance, 130 F.3d 1101 (3d Cir. 1997).

Keller was a 20-year employee of Orix Credit. At the time relevant to this case he was in his fifties and held the positions of Executive Vice President, Chief Financial Officer and Chief Credit Officer. He had also been considered, but not picked, for the position of president. After the company acquired another credit company, Keller signed a three year contract and was tasked with finding sources of funding for the new company. The evidence in the record was mixed as to how well Keller performed this task. During this time a new COO was recruited and hired. Just before the board voted to bring the new COO on, the incumbent suggested that if Keller was too old to do his job he should hire some younger bankers. Ultimately, the company decided to fire Keller, but not before he prepared a plan for raising the money needed by the

company. Keller's replacement, who was just less than five years younger than Keller, raised the needed money using in part the plan prepared by Keller.

Keller sued for age discrimination and the district court decided for Orix Credit. On appeal, a three-judge panel of the Third Circuit initially reversed and decided the case for Keller. The court then granted a request for all the judges of the Third Circuit to hear the case (an "*en banc*" hearing.) In an opinion by Alito, the *en banc* court decided that Keller had not presented enough evidence to support his claim of age discrimination. Three judges disagreed and dissented from Alito's decision.

McArdle v. Tronetti, 961 F.2d 1083 (3d Cir. 1992).

McArdle, an attorney, was convicted of disorderly conduct. In the course of the case, the judge ordered a psychiatric evaluation of McArdle which resulted in a diagnosis of paranoid schizophrenia. While McArdle was in jail, a prison counselor filed a request for his involuntary commitment and the doctor who had provided the original diagnosis falsely testified that McArdle was suffering from paranoia and schizophrenia. McArdle was involuntarily committed and ultimately sued the doctor and the counselor for violation of his constitutional rights.

The district court dismissed the case. In an opinion written by Alito, the Third Circuit upheld the lower court decision ruling that the doctor and the counselor were immune from prosecution because they were integral parts of the judicial process with respect to most of McArdle's claims. The Third Circuit did find, however, that the counselor did not have immunity from prosecution with respect to actual filing of the petition to involuntarily commit McArdle since this action was in no way required by the judicial process. But even in that narrow instance the court threw out the lawsuit finding that McArdle did not plead the facts of his claim with sufficient specificity. A year later, in an unrelated case, the Supreme Court issued a ruling which in effect overruled Alito's decision on this point and made it easier for victims of constitutional violations by government officials to obtain justice. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

Bhaya v. Westinghouse Electirc Corporation, 922 F.2d 184 (3d Cir. 1990), *cert. denied*, 501 U.S. 1217 (1991).

Westinghouse eliminated the job progression for a number of engineers, effectively terminating their employment. The engineers, asserting that their particular group was terminated as opposed to others because it included a larder number of older employees, sued the company under the Age Discrimination in Employment Act (ADEA). After the first trial, the jury found for the employees, but the trial judge overruled them and directed that the verdict be entered for Westinghouse. The employees appealed and the Third Circuit reversed the trial judge's decision because the appeals court found that there was sufficient evidence to support the jury's decision. However, the appeals court also told the trial judge that he could consider granting a new trial.

The district court judge decided that a new trial was warranted because of testimony that had been admitted in the first trial concerning out-of-court conversations. The testimony was offered by one of the plaintiffs (Parzick) about a description of a management meeting related to him by his direct supervisor (Kinlin). Parzick's testimony was that Kinlin said that:

A statement was made that maybe we shouldn't be eliminating this group. Maybe we're doing something illegal or against the contract, and Mr. Nick Kulokoski, who was the personnel manager of the division, said, let's give it a try. What do we have to lose?

922 F.2d at 186.

The trial judge decided that this testimony was irrelevant and prejudicial and should not have been admitted. It was not admitted at the second trial and this time Westinghouse won.

The employees appealed to the Third Circuit and whereby a divided three-judge panel affirmed the trial court's decision in an opinion written by Alito over the strong objections of the dissent. Alito wrote that the appeals court was bound to give great deference to the decision of the trial court that the testimony was irrelevant and prejudicial. The majority also upheld the trial judge's refusal to give a clarifying jury instruction on circumstantial evidence. The employees and the dissent argued that this decision may have led the jury to think – erroneously – that it was required to find discrimination only if there was direct evidence. The dissent concluded that the trial judge had committed legal error in two respects both of which led to the confusion of the jury. As a result, the dissent would have reinstated the original verdict in favor of the employees.

Affirmative Action:

Hopp v. Pittsburgh, 194 F.3d 434 (3d Cir. 1999).

The City of Pittsburgh lost a large number of officers due to early retirement. When they began a concerted effort to hire large numbers of experienced officers to replace those they had lost, they decided to modify their existing procedures somewhat to ensure that African-American applicants would not be unfairly disadvantaged by rankings based on written tests. One of the new changes involved adding an oral examination to the application process. The procedures established that no candidate would be hired who failed the oral exam. There were no predetermined questions for the oral exam and each examination panel had unreviewable discretion to determine who passed and who failed.

Nine white police officers sued who passed the written tests but failed the oral tests. A jury delivered its verdict in favor of the white officers despite the city's arguments that the white officers had presented insufficient evidence of discrimination and that there had been discrimination against an African-American juror. The city appealed, and in a decision written by Alito, a three-judge panel of the Third Circuit agreed with the district court and upheld the verdict for the white police officers, despite its finding that the district judge had failed to properly instruct the jury on the appropriate liability standard.

Religious Coercion and Liberty:

Alito's opinions on issues of religion raise real questions about his commitment to the fundamental principle of the separation of church and state. While Alito appears to defend the asserted rights of individuals to freely exercise their faith, he does not appear to be as vigilant when it comes to ensuring that government does not unconstitutionally endorse religion. This tendency has been especially obvious in the context of a pair of cases dealing with fairly elaborate Christmas holiday displays in and around government buildings.

ACLU-NJ v. Township of Wall, 246 F.3d 258 (3d Cir. 2001).

In 1998 and 1999, the Township of Wall maintained a "holiday" display, including a Christian nativity scene and other symbols associated with Christmas, near the entrance to a municipal office building. The 1999 display included a menorah in addition to the Christmas holiday symbols. Mr. and Mrs. Miller, two town residents and taxpayers who presented evidence that they regularly visited the municipal building in 1998 (and Mr. Miller testified that he observed the 1999 display at least once), sued the town charging that the 1999 exhibit violated

the constitutional principals of separation between church and state. Alito authored an opinion for the Third Circuit in which he dismissed the case because he said the Millers did not have any legal standing for their lawsuit. First he held that they had not offered enough information to show that the town spent tax revenues on the display. Alito also wrote that even if the town did spend tax dollars on the display, the portion attributed to the religious portions of the display were so small as to be negligible. Second, Alito held that the feelings of resentment and exclusion suffered by the Millers due to their exposure to the 1998 display did not provide the basis for a lawsuit challenging the 1999 display.

ACLU-NJ v. Schundler, 168 F.3d 92 (3d Cir. 1999).

Jersey City erected and maintained a holiday display consisting of a creche, a menorah and a Christmas tree in front of the entrance to the main city government building. When this display was enjoined by the district court, Jersey City appealed and while the appeal was pending they added the following elements to their display: some secular symbols of Christmas, Kwanza tree ornaments, and signs proclaiming that the alleged purpose of the display was to celebrate the diverse cultural and ethnic heritages of the city. The ACLU asked the district court to enjoin this new display and the district court refused, stating that the religious symbols in the new display were sufficiently “demystified”, “desanctified” and “deconsecrated.” 168 F.3d at 96. On appeal, a panel of the Third Circuit, not including Alito, held that the first display had been unconstitutional and remanded the case to determine whether the modified display was also unconstitutional. In that decision, the court signaled that while it was remanding the case to the district court, it was skeptical that the modified display was constitutional. Heeding the advice of the Third Circuit panel, the district court ruled that both displays violated the Constitution’s prohibition against the entanglement of church and state. Jersey City appealed again, and this time the new three-judge panel of the Third Circuit included Alito.

In an opinion written by Alito, this panel did not disturb the earlier panel’s ruling that the first display had been unconstitutional, but it did reverse course with respect to the second display. While it is quite rare for one three-judge panel to reverse the decision of another three-judge panel of the same circuit (normally such reversals are the sole province of the whole circuit court sitting together “*en banc*”), Alito argued that the previous panel’s comments expressing skepticism about the constitutionality of the modified display were only advisory. A dissenting opinion by Judge Nygaard, who sat on both panels, expressed concern that Alito did not give sufficient weight to the reasoning of the previous Third Circuit decision. Nygaard wrote:

We [the original panel] explicitly held that the display at issue here, minus Frosty, Santa, the sleigh and the Kwanzaa symbols, was unconstitutional because it had the effect of communicating an endorsement of particular religions. So, I submit that the real question now is whether simply adding Kwanzaa symbols to the tree and placing Frosty (a secular symbol of Christmas), Santa (a once-religious symbol – St. Nicholas – now quite secularized), and a sleigh in the display sufficiently changed the display’s context so as to negate the message that was conveyed by the original display, which we held unconstitutional.

Id. at 109.

FOP Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999), *cert. denied*, 528 U.S. 817 (1999).

The Newark, New Jersey Police Department maintained a policy that police officers could not wear beards. Two Sunni Muslim officers sued arguing that this policy interfered with their right to practice their religion. The district court held that the Police Department’s policy

was unconstitutional, and a three-judge panel of the Third Circuit, in an opinion written by Alito, agreed with the district court. In his decision, Alito noted that the Department allowed a “medical” exception to the beard rule, but did not allow a religious exemption. Given that the Department did not have a substantial justification for refusing to allow a religious exemption, even though it allowed a medical exemption, the court found that the policy violated the First Amendment.

Child Evangelism Fellowship of New Jersey v. Stafford Township School District, 386 F.3d 514 (3d Cir. 2004)

Judge Alito wrote the court’s ruling affirming the grant of a preliminary injunction in favor of a proselytizing organization that sought to distribute its materials to students in the defendant school district’s elementary schools, to post materials in the schools, and to participate in back-to-school nights and distribute materials there. According to the court, Child Evangelism Fellowship (“CEF”) described itself as

“a Bible-centered, worldwide organization composed of born-again believers whose purpose is to evangelize boys and girls with the Gospel of the Lord Jesus Christ and to establish (disciple) them in the Word of God and in a local church for Christian living.”

Id. at 521. “Child Evangelism sponsors Good News Clubs, which host weekly meetings for school-age children during after-school hours,” during which children study the Bible “and learn how to apply the stories and biblical principles” to their lives. *Id.* at 521-22.

Although the school district had agreed to allow the Good News Club to meet in its schools, CEF filed suit when the district, upon advice of counsel “due to Establishment Clause concerns,” *id.*, rejected CEF’s request to have its flyers and parental permission forms distributed to students. The school district also rejected CEF’s request to distribute materials at back-to-school nights. In addition to citing its concerns under the Establishment Clause, the district explained that it did not want to open the schools as a limited public forum, and also that it feared that distributing CEF’s materials would create divisiveness.

In his opinion, Judge Alito rejected the school district’s defense that its fora were closed, noting that the district allowed a number of other outside groups (including the Four-H Club, PTA, and the Boy/Girl Scouts) to distribute and post materials. In addition, the court held that even if the fora were closed, the district could not engage in what Judge Alito described as viewpoint discrimination. Judge Alito opined that it was “clear” that the school district had engaged in such discrimination. *Id.* at 526. Judge Alito rejected the school district’s argument that being required to distribute CEF’s materials would violate the Establishment Clause because young students would perceive such distribution as government endorsement of religion, stating that the district could issue a disclaimer of endorsement and “teachers can explain the point to students.” *Id.* at 534.

Free Speech and Censorship:

Alito’s decisions in the free speech area raise some important and troubling questions about how he would approach First Amendment law as a Supreme Court justice. One theme that runs through the Alito opinions we reviewed is a tendency to approach questions of free speech with an emphasis on morality. That is, Alito’s opinions suggest that he believes that student

speech about morality and “sin” should not be restricted even when it may offend others, while restrictions on speech related to sex are acceptable and do not merit careful review. This dichotomy in Alito’s opinions raises important issues for questioning during his confirmation hearings to ensure that he is not interjecting his own personal opinions and value judgments into the cases he is deciding.

Saxe v. State College Area School District, 240 F.3d 200 (3d Cir. 2001).

The State College Area School District (SCASD) enacted an anti-harassment policy. Students who were concerned that the policy would interfere with their ability to express their strongly held beliefs that homosexuality is a sin sued to stop enforcement of the policy. The lower court dismissed the suit and found that the policy was constitutional because it prohibited no more speech than was already unlawful under federal anti-discrimination law. In an opinion by Alito, the Third Circuit reversed and struck down the policy as unconstitutionally overbroad and vague. In part, Alito’s opinion rested on a concern that the school’s anti-harassment policy was broader than federal anti-harassment law. In a lengthy portion of the opinion, Alito took special pains to make clear his belief that “[a]lthough the Supreme Court has written extensively on the scope of workplace harassment, it has never squarely addressed whether harassment, when it takes the form of pure speech, is exempted from First Amendment protection.” 240 F.3d at 207. As Judge Rendell made clear in her concurrence, Alito’s comments as to whether certain types of workplace harassment might be protected by the First Amendment were inappropriate since this case dealt with issues of freedom of speech – not with workplace harassment. *Id.* at 223. Alito’s opinion raises the question of whether, if he is ever presented with a case alleging a federal civil rights harassment claim involving speech, he might use the First Amendment to weaken fundamental civil rights protections.

An article in the Pittsburgh Post-Gazette ran an editorial highlighting the difficult constitutional issues raised in the case. Although generally supporting the decision, the editorial stated that:

In reaching that conclusion, the majority opinion by Judge Samuel A. Alito Jr. finessed a 1986 Supreme Court decision According to Judge Alito, that later ruling, which upheld the suspension of a student for giving a sexually suggestive speech at a school assembly, dealt only with "lewd," "vulgar" and "indecent speech," not the expression of opinions about another student's "values" (one of the characteristics off-limits to harassment).

"By prohibiting disparaging speech about values," Judge Alito wrote, "the policy strikes at the heart of moral and political discourse -- the lifeblood of constitutional self-government (and demo-cratic education) and the core concern of the First Amendment."

Some aspects of Judge Alito's opinion give us pause. At times, he seems less interested in addressing the case at hand than in attacking the broader notion of speech as a form of illegal harassment. His opinion also sidesteps the real-world difference between adolescents, who should be encouraged to discuss controversial public issues (including gay rights), and younger children such as the State College plaintiffs.

A Lesson in Controversy; School Harassment Code Flunks the Constitution, editorial, *Pittsburgh Post-Gazette*, 2/21/01, p. A-10.

Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994).

This case involved a First Amendment challenge to a law dealing with the placement of election signs by political candidates. A challenger for the Democratic nomination for

Delaware's seat in Congress placed signs near the public right-of-way in a number of areas and ran afoul of state, county and city laws limiting certain types of outdoor advertising and other placement of signs. Following Supreme Court precedent established by a plurality opinion in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), the district court ruled that the state law regulating the types of signs permitted to be placed in various outdoor spaces was unconstitutional because it restricted speech on the basis of content in violation of the First and Fourteenth Amendments. In an unorthodox move, the majority of a divided three-judge panel of the Third Circuit, including Alito in a concurrence, decided that the Supreme Court opinion was too splintered to constitute controlling authority. The majority then proceeded to fashion its own new test to deal with First Amendment challenges to state laws dealing with signs. In so doing, the majority found the law to be unconstitutional, but did so in a way that provided a roadmap to state legislators to enact a new regulatory scheme which might still have the effect of limiting the placement of election signs. A dissent in the case by Judge Garth (a Nixon appointee) took strong exception to the majority's treatment of the Supreme Court's precedent in this area:

I know of no rule of law which countenances the majority's disposition of this case. Certainly nothing in the jurisprudence of the Supreme Court, or in ours, suggests that a three-judge panel of a court of appeals is free to substitute its judgment for that of a four-Justice plurality opinion, let alone that of the entire Court. The majority concedes, in a footnote, that its approach is unprecedented, but justifies its disregard of established principles of stare decisis as an extrapolation of the general reasoning of *Casey*. Nothing in *Casey*, however, suggests that we have the power, indeed the option, to overrule a plurality opinion of the Supreme Court. [see above section on reproductive rights for more about *Planned Parenthood v. Casey*.] 18 F.3d at 1086-1087.

Patriot Party v. Allegheny County Dep't of Elections, 1998 U.S. App. LEXIS 12688 (3d Cir. 1998), *aff'd en banc*, 174 F.3d 305 (3d Cir. 1999).

Pennsylvania had a law which did not allow minor, independent political parties to nominate a candidate for an office when that candidate had previously sought the nomination of a major party for the same office. The practice of more than one political party nominating the same candidate for the same office is known as "fusion." The Patriot Party, which later came to be known as the Reform Party, charged that its constitutional rights to free association and equal protection were violated by the law. The district court decided the case against the Patriot Party, but a panel of Third Circuit judges (in which Alito did not participate) reversed and decided the case for the Patriot Party on both free association and equal protection grounds. *See Patriot Party v. Allegheny County Dep't of Elections*, 95 F.3d 253 (3d Cir. 1996) (*Patriot Party I*). After *Patriot Party I* was decided, the Supreme Court upheld a similar election law in Minnesota, and in so doing, rejected the free association argument. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). The Third Circuit then reconsidered the case given the Supreme Court's intervening decision. In a unanimous three-judge panel decision written by Alito, the Third Circuit held that while the free association argument was no longer valid in the wake of *Timmons*, the equal protection argument remained good law because *Timmons* did not involve an equal protection claim. Therefore, the Third Circuit again struck down the Pennsylvania statute. The full Third Circuit, sitting *en banc*, agreed with this result.

Sanguigni v. Pittsburgh Board of Public Education, 968 F.2d 393 (3d Cir. 1992).

Ms. Sanguigni, a public high school teacher, sued the Pittsburgh School Board and a number of school officials for violating her constitutional rights after she was removed from her coaching position following comments she published in a faculty newsletter. These comments,

which were only a paragraph long and included a quote from Thomas Jefferson, dealt primarily with teacher morale and the need for support for teachers dealing with stress and esteem problems. The comments expressed concern for these problems and suggested that possible solutions include good teaching and good education. In an opinion by Alito, a three-judge panel of the Third Circuit ruled against the teacher. In a decision that seems at odds with widespread public concern about education and the public schools, Alito found that Ms. Sanguigni's comments did not involve a matter of public concern. This decision seems to conflict with other Third Circuit – and even Supreme Court – opinions which protect the rights of public employees to speak their minds on matters of public concern even where such speech is disruptive or related to a personnel dispute. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); *Zamboni v. Stamler*, 847 F.2d 73 (3d Cir. 1988), *cert. denied*, 488 U.S. 899 (1988); *Johnson v. Lincoln University*, 776 F.2d 443 (3d Cir. 1985); *cf. Connick v. Myers*, 461 U.S. 138 (1983).

Banks v. Beard, 399 F.3d 134 (3d Cir. 2005)

Judge Alito dissented from the court's 2-1 ruling in favor of prison inmates who had challenged as violative of their right to Free Speech a regulation of a Pennsylvania prison prohibiting them from having newspapers and magazines (unless religious or legal in nature), and photographs of family and friends. The State Correctional Institution at Pittsburgh imposed these restrictions on certain inmates confined in the Long Term Segregation Unit. The state defended the prohibitions as reasonably related to legitimate penological interests. The Third Circuit majority disagreed. Among other things, the state argued that there was a connection between the prohibitions and security concerns, including fires as well as the concealment of contraband. The court rejected this argument, noting that matches were not permitted in the unit, and that, in any event, "[t]here are many other non-prohibited means for the inmates to fuel fires, hurl waste, conceal contraband and create weapons." 399 F.3d at 143. Judge Alito dissented, and would have held that, on their face, the regulations were "reasonably related to the legitimate penological goal of curbing prison misconduct." *Id.* at 150.

Gun Control and Federalism

A decision we found in which Judge Alito deals with issues of gun control raises very troubling questions about whether a Justice Alito would uphold the nation's laws and regulations dealing with gun sales and ownership. Alito's opinion raises particular concerns because he voted to invalidate the law based on his belief that it exceeded Congress' power under the Commerce Clause of the U.S. Constitution. His opinion tried to extend a restrictive Supreme Court decision on the Commerce Clause, the same clause that undergirds many of the nation's most important civil rights, consumer protection, and worker protection laws. Alito also wrote a decision holding that the Family and Medical Leave Act is unconstitutional as applied to state employees, a decision effectively reversed in 2003 by the Supreme Court.

United States v. Rybar, 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997).

Rybar, a licensed gun dealer, sold two machine guns at a gun show. While Rybar admitted to all of the relevant facts alleged by the government regarding the sale of the guns, he argued that he should not be punished because the federal law prohibiting the transfer or possession of a machine gun was invalid because (1) Congress exceeded its powers in enacting the law and (2) the law interfered with his right to possess firearms under the Second Amendment to the Constitution. The district court rejected both arguments and Rybar appealed

to a three-judge panel of the Third Circuit. A majority of the panel agreed with the district court and found that Congress did have the power under the Commerce Clause to restrict the transfer and possession of machine guns, and that the law was not invalid under the Second Amendment. The court made clear its belief that the Second Amendment protected the possession of firearms only when that possession was related to “the preservation or efficiency of a well regulated militia,” (103 F.3d at 286, *quoting U.S. v. Miller*, 307 U.S. 174, at 178), and noted that the Third Circuit had handed down a number of decisions emphasizing that “the Second Amendment furnishes no absolute right to firearms.” 103 F.3d at 286.

Alito dissented from the majority opinion in order to argue that according to his view of Supreme Court precedent, Congress did not have the power under the Commerce Clause to enact the ban on machinegun possession. His opinion referred to the Supreme Court opinion in *Lopez* invalidating a Congressional ban on guns within school zones, and he stated: “[T]he majority’s theory leads to the conclusion that Congress may ban the purely intrastate possession of just about anything. But if *Lopez* means anything, it is that Congress’s power under the Commerce Clause must have some limits.” *Id.* at 291. In response the majority retorted that “[n]othing in *Lopez* requires either Congress or the Executive to play Show and Tell with the federal courts at the peril of invalidation of a Congressional statute.” *Id.* at 282. Alito’s dissent does not mention Rybar’s Second Amendment argument at all.

Chittister v. Department of Community & Economic Development, 226 F.3d 223 (3d Cir. 2000).

A state employee in Pennsylvania was approved for sick leave and then the sick leave was revoked and he was fired. He sued under the Family and Medical Leave Act of 1993 (FMLA) and the jury found in his favor. The district court, however, decided that the Eleventh Amendment of the Constitution prevented state employees from benefiting from the protections of the FMLA. On appeal, in an opinion by Judge Alito, the Third Circuit upheld the reversal of the jury verdict and held that Congress did not have the power to require state employers to comply with the FMLA. In *Nevada Dept. of Human Resources v. Hibbs*, however, the Supreme Court ruled 6-3 that the law does properly apply to state employees. *See* 123 S. Ct. 1972 (2003).

Worker Protection:

Alito has a mixed record in other cases concerning worker protection. These include, for example, one decision concerning drug testing and another about rights of federal workers.

Bolden v. SEPTA, 953 F.2d 807 (3d Cir. 1991), *cert. denied*, 504 U.S. 943 (1992).

Mr. Bolden worked for five years for the Southeastern Pennsylvania Transit Authority (SEPTA) as a maintenance custodian. In 1986 he was fired after an altercation with another SEPTA employee. Bolden’s union submitted a grievance on his behalf. Meanwhile, SEPTA unilaterally issued a new employee drug-testing policy which, among other things, required employees returning from more than 30 days absence to submit to a drug test. The union challenged the policy in court. Before the court had ruled on the drug testing policy, SEPTA and the union resolved Bolden’s grievance and he was invited to return to work after submitting to the required drug test. Bolden failed the drug test and was fired again. After Bolden was fired for the second time, the court ruled that the drug-testing policy was unconstitutional and enjoined SEPTA from performing the drug tests. Subsequently, Bolden filed another grievance. This time SEPTA and the union agreed that Bolden should be allowed to return to work if he submitted to additional drug testing and substance abuse treatment. Bolden refused the drug testing and treatment and did not return to work.

Bolden then sued SEPTA (and later the union) for various violations of his constitutional rights, especially his Fourth Amendment right to be free of unreasonable searches. After a jury trial, the district court ruled for Bolden and against SEPTA. Eventually, the case was heard by the entire Third Circuit sitting *en banc*. In an opinion by Alito the court rejected most of SEPTA's arguments, but it ultimately ruled against Bolden because it found that the union had validly consented on Bolden's behalf to the second drug test as a requirement of reemployment. In other words, the court held that employees could be bound by collective bargaining to a drug test which would otherwise be unconstitutional without their consent. Judge Nygaard dissented, writing that "[i]ndiscriminate drug testing, entailing invasive blood drawing or other bodily intrusions, is not rendered reasonable for Fourth Amendment purposes by a collective bargaining agreement. The Fourth Amendment bars such drug testing absent a valid *individual* consent or waiver." 953 F.2d at 834 (emphasis in original).

Mitchum v. Hurt, 73 F.3d 30 (3d Cir. 1995), *reh'g denied*, 1996 U.S. App. LEXIS 4626 (3d Cir. 1996).

There is a disagreement among the circuit courts about whether or not federal employees who are covered by the administrative remedies provided by the Civil Service Reform Act (CSRA) and other federal statutes may also bring lawsuits in federal court to address violations of their constitutional rights. In *Mitchum v. Hurt*, federal employees of the Veteran's Administration spoke publicly about their concerns with patient care and then claimed that they were the victims of retaliation. In writing the majority opinion, Alito sided with the D.C. Circuit in holding that federal employees should be able to press their claims in federal court even when they have not pursued the administrative remedies under the CSRA. Like all other circuit courts that have ruled on the issue, Alito held that monetary damages are not available in court. But he did decide, unlike several other circuit courts including the Seventh, Ninth, Tenth and Eleventh, that employees could sue to obtain "equitable relief" such as reinstatement, cessation of harassment and retaliation, and expungement of negative employment records.

Access to Justice

Poole v. Family Court of New Castle County, 368 F.3d 263 (3d Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 444 (Jan. 10, 2005).

Judge Alito wrote the court's opinion holding that a state prison inmate's notice of appeal in this civil rights case had not been filed timely and the Third Circuit therefore lacked jurisdiction to consider the appeal, even though the inmate was not represented by counsel and the short delay in filing the notice was not due to any fault of his but because he had been transferred to another institution and there was thus a delay in his receipt of the district court's ruling. Noting that this was a matter of first impression for the Third Circuit, Judge Alito refused to consider the *pro se* inmate's untimely notice of appeal as a motion to reopen the lower court's judgment, which if granted would have permitted the appeal to be heard. Judge Alito's opinion specifically recognized that "the Eleventh Circuit reached a contrary result" in an earlier case, 368 F.3d at 268, but declined to follow that ruling. Judge Alito further noted that his interpretation of the Federal Rules of Appellate Procedure in this case "may lead to harsh results . . ." *Id.* at 269.

Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004), *rev'd*, *Rompilla v. Beard*, 2005 U.S. LEXIS 4846 (June 20, 2005)

Ronald Rompilla was convicted of murder and sentenced to death. During the sentencing phase of his trial, his attorneys failed to consider material that they knew the prosecution was likely to rely on as evidence of aggravation supporting capital punishment. Had they taken this material into consideration, “it is uncontested that they would have found a range of mitigation leads that no other source had opened up.” 2005 U.S. LEXIS 4846 at 29. Rompilla brought a petition for a writ of habeas corpus, arguing that he had been denied his right to effective assistance of counsel. The district court agreed, holding that defense counsel had failed to investigate “‘pretty obvious’ signs that Rompilla had a troubled childhood and suffered from mental illness and alcoholism. . . .” 2005 U.S. LEXIS 4846 at 10 (citation omitted). In a 2-1 ruling, the Third Circuit reversed. Judge Alito wrote the majority opinion, holding that Rompilla was not entitled to relief. Judge Sloviter dissented, citing the “shocking ineffective assistance of counsel at the sentencing phase.” 355 F.3d at 273.

Rompilla appealed to the Supreme Court, which overturned Alito’s ruling, 5-4. In an opinion by Justice Souter (joined by Justices O’Connor, Ginsburg, Stevens, and Breyer), the Court held that a defense attorney is “bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.” 2005 U.S. LEXIS 4846 at 8. As Justice Souter explained, “[t]he notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense,” but also an obligation set out in the ABA’s Standards for Criminal Justice: “[t]he investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.” *Id.* at 24.

Judicial Philosophy and Temperament:

Very little has been written in either the press or journals about Judge Alito’s judicial philosophy or temperament. What has been written suggests that he is very conservative but relatively mild-mannered. He is reported to have been nicknamed “Scalito” in reference to the resemblance between his judicial philosophy and that of Justice Antonin Scalia; however, most reports suggest that he does not have Scalia’s penchant for sarcasm and divisive language.

The Mild-Mannered Scalia, by Shannon P. Duffy, *The Legal Intelligencer*, 3/3/03.

There’s a nickname for federal appeals Judge Samuel Alito Jr. that captures two things at once – his particular brand of legal conservatism and a recognition that his credentials are strong enough to put him on any Republican president’s short-list for the U.S. Supreme Court.

Some lawyers call the judge “Scalito.”

Roughly translated, the nickname means “Little Scalia,” suggesting that Alito, a judge on the 3rd U.S. Circuit Court of Appeals, has modeled himself after Supreme Court Justice Antonin Scalia. ...

In some ways, the Scalito moniker hits the mark. In his 13 years on the 3rd Circuit, Alito has earned his stripes as a strong and intelligent voice on the growing conservative wing of a court once considered among the country’s most liberal.

As with Scalia, lawyers say that Alito’s vote is easy to predict in highly charged cases.

But where the nickname misses is temperament, or what some might call personality. Personality-wise, on the bench and in person, Alito is no Scalia.

Though he's a frequent dissenter and not at all afraid to disagree with his colleagues, Alito's opinions are usually devoid of passion. And his tone during oral arguments is probing but always polite.