PRELIMINARY REPORT ON THE NOMINATION OF THIRD CIRCUIT JUDGE SAMUEL ALITO TO THE SUPREME COURT

President Bush has nominated Samuel Alito to the Supreme Court. This report provides a preliminary summary of Judge Alito's record on the United States Court of Appeals for the Third Circuit. It does not examine his work as a government lawyer. The report focuses primarily on opinions and dissents that Judge Alito authored, though it also includes several cases where Judge Alito joined the opinions of other judges. Almost all of the cases discussed involve divided three-judge panel or full court *en banc* decisions – i.e., decisions where there was a dissent. A more comprehensive analysis of Judge Alito's record will be forthcoming.

I. OVERVIEW

Judge Alito is the leading conservative voice on the Third Circuit. His almost uniformly conservative rulings in close cases – the kind the Supreme Court hears – have led some to compare his judicial philosophy to that of Supreme Court Justice Antonin Scalia.[1] According to the *National Law Journal*, Judge Alito "is described by lawyers as exceptionally bright, but much more of an ideologue than most of his colleagues."[2]

Despite President Bush's suggestion that he values judges who are "restrained" and understand the limited role of the courts, Judge Alito has aggressively sought to curb Congress' legislative authority to tackle issues of national importance, voting to invalidate a federal prohibition on machine gun possession and part of the federal Family and Medical Leave Act. For this reason, journalist and legal scholar Jeffrey Rosen, who supported the nomination of John Roberts, asserted that Judge Alito has been a "conservative activist" whose "lack of deference to Congress is unsettling."[3] In the 1996 case upholding Congress' authority to pass a machine gun ban, Judge Alito's colleagues pointed out that the approach adopted by his dissent would require the elected branches of government to "play Show and Tell with the federal courts."[4] Judge Alito's views suggest a commitment to accelerating the arrogation of power to the Supreme Court and away from Congress that was one of the hallmarks of the Rehnquist era.[5] Republicans and Democrats alike, including Judiciary Committee Chair Arlen Specter, have recently

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[1] Shannon Duffy, *The Mild-Mannered Scalia*, PENNSYLVANIA LAW WEEKLY, Mar. 10, 2003, at 14.
[2] Joseph Slobodzian, *Third Circuit – Microcosm of Change*, NATIONAL LAW JOURNAL, Dec. 7, 1992, at 1.
[3] Jeffrey Rosen, *How to Judge*, THE NEW REPUBLIC, Dec. 6, 2004, at 18.
[4] *United States v. Rybar*, 103 F.3d 273, 282 (3d Cir. 1996) *cert. denied* 522 U.S. 807 (1997).
[5] As Jeffrey Rosen has noted, between 1995 and 2003 the Rehnquist court struck down thirty-three federal laws on constitutional grounds, doing so at a higher annual rate than any court in American history. Jeffrey Rosen, *The Unregulated Offensive*, THE NEW YORK TIMES MAGAZINE, Apr. 17, 2005.

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criticized both the Supreme Court and lower federal courts for voting to strike down federal protections without appropriately deferring to Congress as a co-equal branch of government.

In several divided decisions, Judge Alito has also undermined Congressional intent by voting in dissent to make it harder for plaintiffs to prove claims of race and sex discrimination. In one case, he was alone among 11 judges, voting not only to deny relief to the alleged victim but to place a new procedural hurdle in the path of others making discrimination claims. In another case, the majority asserted that that the federal law barring employment discrimination "would be eviscerated if our analysis were to halt where [Judge Alito's dissent] suggests."[6]

In divided decisions in the area of constitutional freedoms, Judge Alito has:

- twice voted in dissent to uphold intrusive police searches of women and children who were not named in search warrants and were not the subjects of any investigation. In one of the cases, which involved strip searches of a mother and daughter caught in the wrong place at the wrong time, President Bush's Director of Homeland Security, Michael Chertoff – then Judge Alito's colleague on the Third Circuit – sharply criticized Judge Alito's position.

- upheld curbs on reproductive freedom. When the Third Circuit heard *Planned Parenthood of Central Pennsylvania v. Casey* – the case that, in the Supreme Court's hands, became the source of the new standard for the constitutional right to abortion – Judge Alito was the only judge who voted to allow the Commonwealth of Pennsylvania to require a woman to notify her spouse before having an abortion. Although both the Third Circuit and the Supreme Court in *Casey* allowed new restrictions on the right to abortion, both courts rejected his position. Justice O'Connor analogized the spousal notification restriction to common law rules that subjugated wives to their husbands and banned women from the practice of law.

- shown limited appreciation for the rights of the accused. In one noteworthy dissent, he dismissed evidence of race discrimination by a prosecutor in jury selection. In another opinion, he upheld a death sentence against a claim that the defendant's counsel was constitutionally deficient. The Supreme Court reversed 5-4, with Justice O'Connor casting the deciding vote.

In one divided decision, where the maker of transparent tape challenged the alleged monopoly of Scotch brand tape giant 3M, Judge Alito also voted to diminish protections for small businesses against anti-competitive practices. According to one of his fellow judges, his

[6] *Bray v. Marriot Hotels*, 110 F.3d 986 (3d Cir. 1997).

position – soon vacated and overruled by the *en banc* Third Circuit – would have weakened a key provision of the Sherman Antitrust Act "to the point of impotence."[7]

Nominated to be Justice Sandra Day O'Connor's replacement, Judge Alito would almost certainly shift the balance of the Supreme Court hard to the right. As law professor Jonathan Turley noted the day Judge Alito's nomination was announced: "There will be no one to the right of Sam Alito on this Court."[8]

II. BRIEF BIOGRAPHY

Samuel A. Alito, Jr., was born April 1, 1950, in Trenton, New Jersey. He received his bachelor's degree from Princeton University in 1972, graduating Phi Beta Kappa as a selected scholar in the Woodrow Wilson School of Public and International Affairs. At Yale Law School, where he received his J.D. in 1975, Judge Alito was honored for the best moot court argument and best contribution to the Yale Law Journal. He also received a commission as a second lieutenant in the Army upon graduation from college, and beginning in law school, spent eight years in the Army Reserve. Judge Alito was on active duty for training from September to December 1975, and was honorably discharged from the Reserve in 1980.

Following law school, Judge Alito clerked for Judge Leonard Garth on the U.S. Court of Appeals for the Third Circuit, then served as an Assistant U.S. Attorney for the District of New Jersey from 1977 to 1981. From 1981 to 1987 he worked for the Reagan Administration at the U.S. Department of Justice in Washington, D.C., first as Assistant to the U.S. Solicitor General (1981-1985) and then as Deputy Assistant Attorney General (1985-1987). Judge Alito moved back to New Jersey in 1987 to serve as U.S. Attorney for the District of New Jersey.

As an Assistant U.S. Attorney and later U.S. Attorney for the District of New Jersey, Judge Alito tried both criminal and civil cases. In addition to trial work, he argued twenty cases on appeal before the Third Circuit.

As Assistant Solicitor General, Judge Alito litigated cases on behalf of the federal government and its agencies in the U.S. Supreme Court, arguing twelve of them. In addition to actual litigation, Judge Alito provided recommendations to the Solicitor General whether or not to review approximately 200 cases.

While serving as Deputy Assistant Attorney General in the Office of Legal Counsel, Judge Alito provided legal advice to the Department of Justice and other executive agencies. By his count, he authored or supervised the preparation of approximately fifty memoranda containing his recommendations "on a very broad range of legal issues, on many of which there

[7] *LePage's v. 3M* Corp., 277 F.3d 365, 26 (Westlaw pagination) (3d Cir. 2002) *vacated by* 324 F.3d 141 (3d Cir. 2003) (*en banc*).
[8] *The Today Show*, Oct. 31, 2005.

was sharp division between government agencies."[9] Senators should obtain these memoranda, as well as Judge Alito's recommendations to the Solicitor General, in order to obtain a full account of his record as a government attorney.

In 1990, President George H.W. Bush nominated and the Senate confirmed Judge Alito to the seat on the Third Circuit vacated by Judge John Gibbons.

Like many of President Bush's judicial nominees, Judge Alito has been a member of the conservative Federalist Society for many years, addressing the organization's National Convention in 1997 and 2004. Before his appointment to the appellate bench in 1990, Judge Alito was also actively involved in federal bar associations in New Jersey. He served as a member of the Lawyers' Advisory Committee for the U.S. District Court of New Jersey from 1987 to 1990, on the Advisory Board of the Association of the Federal Bar of New Jersey from 1988 to 1990, and as a member of the Executive Board of the Federal Practice and Procedure Committee from 1988-1989. Judge Alito also participated in the National Environmental Enforcement Council, a Department of Justice working group.

III. JUDGE ALITO'S RECORD ON THE THIRD CIRCUIT

A. Congressional Authority

U.S. v. Rybar.[10] One year after the U.S. Supreme Court came out with its landmark decision in *U.S. v. Lopez*[11] – invalidating an act of Congress on Commerce Clause grounds for the first time in nearly sixty years – the Third Circuit heard a case challenging Congress' power under the Commerce Clause to prohibit the possession or transfer of machine guns. Raymond Rybar, a licensed firearms dealer who sold two machine guns at a gun show, challenged his indictment for violating 18 U.S.C. § 922 (o) of the Firearms Owners' Protection Act. Following the law of five other circuits, the *Rybar* majority held that "the regulation of machine gun transfer and possession comes within Congress' power to legislate under the Commerce Clause."[12] Judge Alito dissented, asserting that *Lopez* required invalidation of the statute as applied to the facts of the case. *Rybar* was appealed to the U.S. Supreme Court, which declined to hear it.[13]

Writing for the majority, Judge Sloviter addressed Judge Alito's dissent at length, distinguishing *Rybar* from *Lopez* in detail. Judge Sloviter noted, for example, that whereas the statute at issue in *Lopez* regulated gun possession only in school zones – which the Supreme Court held would have too limited an effect on interstate commerce – the prohibition on machine guns in *Rybar* is absolute, with no geographic limitations. Judge Sloviter observed that Congress

[9] Samuel Alito, Jr., Responses to Senate Judiciary Committee Questionnaire, Feb. 24, 1990, at 14.
[10] *United States. v. Rybar*, 103 F.3d 273 (3d Cir. 1996) *cert. denied* 522 U.S. 807 (1997).
[11] 514 U.S. 549 (1995).
[12] *Rybar*, 103 F.3d at 285.
[13] See 522 U.S. 807.

could thus have reasonably concluded that such a ban would have a more substantial effect on interstate commerce than the school zone ban.[14] Drawing the most heat from Judge Sloviter was Judge Alito's proposition that Congress be required to make findings showing a link between the regulation and its effect on interstate commerce, or that Congress or the president document such a link with empirical evidence. "We know of no authority to support such a demand on Congress," wrote Judge Sloviter.[15] She continued:

> [M]aking such a demand of Congress or the Executive runs counter to the deference that the judiciary owes to its two coordinate branches of government, a basic tenet of the constitutional separation of powers. Nothing 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.[16]

Rybar serves as a stark indicator that, if elevated to the Supreme Court, Judge Alito could expand upon the Rehnquist Court's restrictive view of Congress' power, and its corresponding, expansive view of the Court's own authority.

Chittister v. Department of Community and Economic Development.[17] Writing for a unanimous panel, Judge Alito held that though Congress attempted to abrogate the states' Eleventh Amendment immunity when it passed the personal leave provision of the Family and Medical Leave Act (FMLA), it did not do so validly under Section 5 of the Fourteenth Amendment. The Supreme Court later held in *Nevada Department of Human Resources v. Hibbs*[18] that Congress properly abridged the states' Eleventh Amendment immunity with respect to the family care provision of the act. *Hibbs* has since been read by some courts to have validated the constitutionality of the entire FMLA, thus rejecting Judge Alito's holding in *Chittister*.[19]

B. Employment Discrimination

In a series of cases resulting in split panel or *en banc* decisions, Judge Alito has advanced a cramped reading of civil rights laws, notably Title VII of the Civil Rights Act of 1964, which bars various forms of discrimination in employment. Even when plaintiffs in these cases came forward with substantial evidence of Title VII violations, Judge Alito voted – often in dissent – to affirm lower courts' decision to deny relief without letting juries decide whether

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[14] *Rybar*, 103 F.3d at 282.
[15] *Id.*
[16] *Rybar*, 103 F.3d at 282.
[17] 226 F.3d 223 (3d Cir. 2000).
[18] 538 U.S. 721 (2003).
[19] Most notably, following *Hibbs*, three of the most conservative members of the conservative Fourth Circuit, Judges Luttig, Wilkinson, and Wilson, unanimously upheld the constitutionality of the entire FMLA as applied to the states. *See Montgomery v. Maryland*, 42 Fed. Appx. 17, 19 (4th Cir. 2003) (*per curiam*) "sovereign immunity does not protect the states in FMLA actions."

discrimination occurred. In a few of the cases, his colleagues have accused him of inappropriately assuming the role of the jury or trial judge.

Sheridan v. E.I. DuPont de Nemours.[20] Hotel employee Barbara Sheridan brought a claim of sex discrimination against her employer. Sheridan had been employed at the Hotel du Pont for a decade, rising through the ranks to the position of "head captain" after being steadily promoted from her first position as a part-time waitress. She also received numerous commendations for her work. After complaining of sexual harassment, however, Sheridan was demoted to a non-supervisory position and her work environment deteriorated to the point where she could no longer continue working at the hotel. Those facts formed the basis of Sheridan's claim of constructive discharge, which was the central claim before the Court of Appeals.

By a vote of 10-1 – with only Judge Alito dissenting – the full Third Circuit reversed the district court's grant of summary judgment for the hotel on the constructive discharge claim and remanded the case for reconsideration of its motion for new trial. The court's holding – and dispute with Alito – hinged on its interpretation of Third Circuit and Supreme Court precedent regarding litigants' shifting evidentiary burdens in discrimination actions under Title VII. The court held that once a plaintiff had established a *prima facie* case for sex discrimination and then produced evidence of pretext to rebut a defendant's production of evidence that the allegedly discriminatory action was taken for legitimate reasons, the plaintiff would survive summary judgment and have her day in court. According to the majority, its holding was consistent with three Third Circuit precedents and with seven other circuits' interpretations of *Saint Mary's Honor Center v. Hicks*,[21] the leading Supreme Court case on shifting evidentiary burdens. As the majority noted, the Supreme Court crafted the particular procedural regime based on its recognition of the inherent difficulty of proving employers' discriminatory motivations. The Supreme Court has noted that "[t]he shifting burdens of proof … are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence."[22]

Judge Alito would have held that once a defendant produces evidence showing that it had a legitimate reason for the conduct in question, the evidence contained in the plaintiff's *prima facie* case would be entirely neutralized. Such a holding, the majority wrote, would have reproduced the "confusion and uncertainty" that prompted the court to hear the case *en banc* in the first place.[23] In staking out his position, Judge Alito ignored circuit and Supreme Court precedent and decided a procedural issue in such a way as to make it more difficult for workers claiming sex discrimination to have their day in court. Ten of Judge Alito's colleagues agreed that the evidence produced by Ms. Sheridan was enough to let a jury decide whether she had been constructively discharged.

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[20] 100 F.3d 1061 (3d Cir. 1996) (*en banc*).
[21] 509 U.S. 502 (1993).
[22] *Sheridan*, 103 F.3d at 1072 (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121).
[23] *Id*. at 1070 n7.

Bray v. Marriott Hotels.[24] Beryl Bray, also a hotel employee, challenged her employer's decision not to promote her, claiming that the decision was the result of racial bias. The court of appeals held that the Bray had shown enough evidence of possible racial discrimination to merit a trial before a jury. As in *Sheridan*, Judge Alito dissented, saying that the plaintiff had not produced enough evidence even to get to trial. The majority opinion strongly criticized Judge Alito's approach, saying that "Title VII would be eviscerated if our analysis were to halt where the dissent suggests."[25] In addition to this critique of Judge Alito's "tightly constricted"[26] reading of Title VII, the majority also accused Judge Alito of overstepping the judicial role and acting as a factfinder by taking it upon himself to interpret the meaning of the deposition testimony of one of the defendants.[27]

Nathanson v. Medical College of Pennsylvania.[28] In *Nathanson*, Judge Alito's colleagues again accused him of inappropriately limiting plaintiffs' access to courts and assuming the factfinder's role. The Third Circuit panel reversed the district court's grant of summary judgment for the defendant college, but Judge Alito dissented. At the center of the dispute was the college's knowledge of and response to the disability needs of student Jayne Nathanson. Nathanson suffered from severe back pain that made it so difficult for her to sit in class that she had to drop out of medical school. She claimed that the defendants failed to reasonably accommodate her disability by providing her a different seating arrangement. The court held that the district court's misreading of applicable law and the existence of unresolved issues of material facts required a jury to hear her claims, brought under § 504 of the Rehabilitation Act.

Judge Alito disagreed with the majority, writing that Nathanson failed to prove that the college acted unreasonably in its responses to her requests for alternative seating arrangements. According to the majority, "few if any Rehabilitation Act cases would survive summary judgment if such an analysis were applied to each handicapped individual's request for accommodations."[29] Like the majority in *Bray*, the court accused Judge Alito of judicial overreach, writing "[w]e believe that the dissent has resolved several issues of disputed fact."[30]

Keller v. ORIX Credit Alliance.[31] Judge Alito wrote for the divided, 8-4 *en banc* court, upholding summary judgment for the defendant corporation in a case brought by a former ORIX executive under the Age Discrimination in Employment Act (ADEA) and New Jersey Law Against Discrimination (NJLAD). Frederick Keller, a former ORIX vice president and member of its board of directors, claimed that ORIX used his age against him when deciding not to

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[24] 110 F.3d 986 (3d Cir. 1997).
[25] *Bray*, 110 F.3d at 993.
[26] *Id*.
[27] *Id*. at 991. Wrote Judge McKee, "[t]he dissent chooses to interpret this as merely Nemetz's inarticulate statement that he was seeking the 'best' candidate, and that Bray, though qualified, was not the 'best qualified' candidate. A factfinder may well agree with that interpretation, but that is not for us to decide." (internal citation omitted).
[28] 926 F.2d 1368 (3d Cir. 1991).
[29] *Nathanson*, at 1387 n.13.
[30] *Id*.
[31] 130 F.3d 1101 (3d Cir. 1997).

promote him to chief operating officer and then when firing him two years later. Keller's case centered on the comment, "[i]f you are getting too old for the job, maybe you should hire one or two young bankers," made by Daniel Ryan, the company president who later decided to fire Keller.[32] Judge Alito's opinion defends the reasons provided by ORIX for passing Keller over for promotion and then firing him.

Judge Roth, in partial dissent, noted with concern that Judge Alito's holding implied that a plaintiff could lose on summary judgment even if he or she produced *direct* evidence of discrimination. Judge Lewis, dissenting in an opinion joined by Judges Mansmann and McKee, noted that, as in the cases mentioned above, Judge Alito acted as a factfinder by dismissing the significance of the "too old" comment on the grounds it was made four to five months prior to Keller's termination. Furthermore, wrote Judge Lewis, Judge Alito misapplied precedent. Citing several key cases under which Keller's claims were analyzed by Judge Alito, Judge Lewis found that the "too old" comment and other evidence should have allowed Keller to survive summary judgment.

Taxman v. Board of Education of the Township of Piscataway.[33] Judge Alito voted with a divided, 8-4 *en banc* majority in a Title VII case involving the application of an affirmative action policy to employment terminations. In *Taxman*, a school board was faced with the decision of having to lay off one of two teachers – Sharon Taxman, who is white, and Debra Williams, who is black – in the Business Department of Piscataway High School. After taking account of seniority – the two teachers started their jobs on the same day – classroom performance, evaluations, volunteerism, and certifications, the board determined that Taxman and Williams were "of equal ability" and "equal qualifications."[34] Rather than drawing lots or having a lottery, the Board, citing the importance of racial diversity in education, took into account the teachers' race. Because there were no other people of color in the Business Department, the Board retained Williams and laid off Taxman.

In an opinion by Judge Mansmann, the *en banc* Third Circuit held that Title VII forbids taking race into account when an employer makes an employment decision and that non-remedial promotion of racial diversity was no exception to that prohibition. The court struck the Piscataway Board's affirmative action plan mandating that race, national origin, and gender minority status be taken into account when job candidates "appear to be of equal qualification."[35] The majority also held that the Supreme Court's Equal Protection case law – which includes references to the importance of diversity in education and on which the Board relied – was inapplicable to Title VII.

Judges Sloviter, Scirica, Lewis, and McKee all wrote dissents. In criticizing the majority's reading of Supreme Court precedent, Judge Sloviter pointed out that in the two main

[32] *Keller*, 130 F.3d at 1106 (quoting deposition of Frederick Keller).
[33] 91 F.3d 1547 (3d Cir. 1996) (*en banc*).
[34] *Taxman*, 91 F.3d at 1547.
[35] *Id.* at 1550.

cases cited by the majority, the Supreme Court *sustained* the affirmative action plans being challenged, "and in doing so deviated from the literal interpretation of title VII precluding use of race or gender in any employment action."[36] Judge Sloviter opined that it was implausible to suggest that the drafters of Title VII would have preferred that a lottery be used "rather than employ the School Board's own educational policy undertaken to insure students an opportunity to learn from a teacher who was a member of the very group whose treatment motivated Congress to enact Title VII in the first place."[37] Pointing out that the selection of Ms. Williams would mean retaining the one black teacher in the Business Department "in anyone's memory," Judge McKee wrote that "[a] law enacted by Congress in 1964 to move this country closer to an integrated society and away from the legacy of 'separate but equal' is being interpreted as outlawing this Board of Education's good faith effort to teach students the value of diversity."[38]

Zubi v. AT&T.[39] Although Judge Alito has often relied on procedural rules to extinguish civil rights claims, here he construed the statute of limitations provision of an employment discrimination statute so as to benefit the plaintiff. Dissenting from the panel opinion, he would have allowed the plaintiff's claim for race discrimination to proceed under the four-year statute of limitations prescribed by the 1991 amendments to Title VII, rather than the shorter limitations period in the original 1964 law. The Supreme Court later unanimously upheld his reading of the law.[40]

C. Civil Liberties

Like his often narrow reading of Title VII, Judge Alito's liberal construction of search warrants raises concerns. In several cases brought by women and children who were subjected to unconstitutional, intrusive searches, Judge Alito has pushed unsuccessfully for expansive readings of warrants. One such case drew a rebuke from then-Judge Michael Chertoff, now one of the nation's chief law enforcement officials as Director of Homeland Security.

Baker v. Monroe Township.[41] Inez Baker and her three children arrived at the home of Mrs. Baker's oldest son, Clementh Griffith. Unbeknownst to Baker, Griffith was under investigation for drug offenses, and his house was raided by police at the very moment Inez and her teenaged children approached the property. Mrs. Baker and her children were threatened with guns and handcuffed, some for as long as twenty-five minutes. Mrs. Baker's pocketbook was emptied onto the ground, and her 17-year-old son Corey was taken in the house and searched.

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[36] *Id*. at 1570 (Sloviter, J., dissenting) (citing *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987)).
[37] *Id*. at 1572 (Sloviter, J., dissenting).
[38] *Id*. at 1578 (McKee, J., dissenting).
[39] 219 F.3d 220 (3d Cir. 2000) overruled by *Jones v. R.R. Donnelly & Sons*, 541 U.S. 369 (2004).
[40] *See Jones v. R.R. Donnelly & Sons*, 541 U.S. 369 (2004).
[41] 50 F.3d 1186 (3d Cir. 1995).

Bringing a claim under 42 U.S.C. § 1983, which creates a cause of action when state or local government officials violate someone's federal rights, Mrs. Baker and her children alleged, among other things, that the police violated their Fourth Amendment rights to be free from unreasonable searches and seizures. The Third Circuit affirmed the district court's grant of summary judgment for the defendants on several of the claims, but reversed on the questions of excessive force and the legality of the search conducted. The court held that, under the circumstances, there was no evidence to justify the type of force used by the officers and that a jury could find that if Officer Armstrong, who directed the raid, acquiesced in the use of force, he would be liable for the violation.

Judge Alito, in dissent, took the position that Officer Armstrong would have to have actually seen the use of excessive force in order to be held to have had "actual knowledge" of it.[42] The majority rejected that analysis as "too narrow" in the context of summary judgment. Because there was evidence from which Armstrong's knowledge could have been inferred by the jury – Armstrong's "hollering" instructions to the officers who engaged in excessive force from inside the house – the court held that summary judgment was inappropriate.[43]

Even more distressing is Judge Alito's expansive reading of the search warrant in the case. The warrant consisted of a form containing check boxes and a larger blank space below for more specific information. The form authorized the search of the premises, person, and vehicle described "below," in the blank field. The space, however, contained only a description of the premises, with no description of any persons. Given that deficiency, the majority held that the warrant clearly lacked the particularity required by the Fourth Amendment and thus could not have authorized the searches of Mrs. Baker and her children. Judge Alito, however, went to great lengths to find the warrant lawful, conceding that "it would have been better draftsmanship to have referred specifically … to any persons found on the premises, but for practical purposes the scope of the search that was authorized seems to me quite apparent."[44]

Judge Alito's analysis led the majority to counter that his lengthy rationalizations "simply point up the inadequacy of the warrant to describe any person generally or specifically."[45] Judge Alito inferred that the lack of specific reference to persons to be searched amounted to an authorization to search *anyone* on the premises when the warrant was executed. The majority countered that "[t]he only common-sense interpretation of the document is that no one ever bothered to complete it to include specified persons as well as premises."[46]

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[42] *Baker*, 50 F.3d at 1201 (Alito, J., dissenting).
[43] *Id*. at 1194.
[44] *Id*. at 1198.
[45] *Baker*, 50 F.3d at 1189 n.1.
[46] *Id*. Some circuits, including the conservative Fourth, and many state courts, have invalidated the very "all persons" warrants that Judge Alito tried to say existed in *Baker*. See *Owens v. Lott*, 372 F.3d 267 (4th Cir. 2004), citing *State v. De Simone*, 288 A.2d 849, (N.J. 1972) as the leading state court case on the issue. See *Owens*, 372 F.3d at 274.

Doe v. Groody.[47] In another case involving claims of Fourth Amendment violations under Section 1983, Judge Alito went out of his way to find that a deficient warrant authorized the invasive search of a mother and her child. The warrant request in *Doe* was accompanied by an affidavit listing everything the police wanted to search. When the magistrate signed the warrant, he incorporated specific parts of the affidavit, but not the request to search anyone on the premises. The warrant instead limited the search of persons to the suspect, John Doe. When officers executed the warrant, however, Jane Doe and her ten-year-old daughter, Mary, were present. A female officer took Jane and Mary to an adjacent room and strip-searched them.

Judge Alito's successor as U.S. Attorney of New Jersey, now Director of Homeland Security Michael Chertoff, wrote the majority opinion. Judge Chertoff held that the warrant clearly limited police authority to the search of John Doe, and did *not* authorize the search of anyone found on the premises, as had been requested in the affidavit. Holding otherwise – that the warrant *de facto* incorporated the affidavit – risked, in Chertoff's words, "transform[ing] the judicial officer into little more than the cliché 'rubber stamp.'"[48] Judge Alito favored "the rubber stamp" approach, accusing the majority of a "technical" and "legalistic" reading of the warrant.[49] Unconvinced by Judge Chertoff's position, Judge Alito weakly supported his case for the warrant's sufficiency by quoting favorably testimony from one of the defendants that "the only reason that the words 'and other occupants of the residence' do not appear on the face of the search warrant is there's no room (sic.)."[50]

The Chertoff majority also affirmed the district court's denial of qualified immunity to the officer who engaged in the search, holding that searching Jane and Mary Doe for evidence outside the scope of the warrant and without probable cause was a clearly established violation of the Fourth Amendment. Because he believed that any reasonable officer would have found the warrant to have authorized a search of all persons present, Judge Alito would have granted qualified immunity to the defendant officers.

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[47] 361 F.3d 232 (3d Cir. 2004).
[48] *Doe*, 261 F.3d at 243.
[49] *Id*. at 247 n.12 (Alito, J., dissenting).
[50] *Id*. at 246.

D. Death Penalty and the Right of *Habeas Corpus*

***Note:* This preliminary report does not address Judge Alito's record on appeals from federal criminal convictions or sentences.**

In several divided decisions, Judge Alito has shown little solicitude for death row inmates bringing *habeas corpus* claims, particularly claims based on ineffective assistance of counsel and racial discrimination in jury selection. His stinginess toward such claims in these cases runs contrary to recent Supreme Court decisions emphasizing the importance of both race-neutral jury selection and constitutionally adequate counsel.[51] In one case decided last term, *Rompilla v. Beard*,[52] the Supreme Court reversed Judge Alito for refusing to credit a claim of ineffective assistance of counsel. Justice O'Connor cast the deciding vote.

Rompilla v. Horn.[53] Judge Alito wrote the majority opinion denying a writ of *habeas corpus* in *Rompilla*. The Supreme Court reversed in June 2005.[54] Applying the standards set out by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Judge Alito held that the capital defendant's attorneys' failure to obtain school records and other information that would have provided mitigating evidence at sentencing did not constitute ineffective assistance of counsel. Judge Alito also held that a judge need not inform a jury that the penalty of life imprisonment without parole was the alternative to a death sentence, even where a jury requests such information.

Judge Sloviter issued an impassioned dissent, calling the court's rejection of the ineffective assistance of counsel claim "inexplicable."[55] In her view, the lawyers' performance was "shocking," and did not meet the Supreme Court's standards set forth in *Strickland v. Washington*.[56] The Court's most recent application of the *Strickland* ineffectiveness standard, Judge Sloviter argued, contained circumstances "remarkably similar" to those in *Rompilla*, and dictated a different result.[57]

Dissenting from the Third Circuit's 7-5 decision not to rehear the case *en banc*, Republican appointee Judge Nygaard expressed great concern for relaxing the constitutional standard for effective counsel, as he believed Judge Alito had:

> The issue before us implicates the most fundamental and important of all rights – to be represented by effective counsel. All other rights will turn to ashes in the

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[51] *See Miller-El v. Dretke*, 2005 U.S. LEXIS 4658 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003).
[52] *Miller-El*, 2005 U.S. LEXIS 4846 (2005).
[53] 355 F.3d 233 (3d Cir. 2004) reh'g denied by *Rompilla v. Horn*, 359 F.3d 310 rev'd in part *sub nom. Rompilla v. Beard*, 2005 U.S. LEXIS 4846 (2005).
[54] *See Rompilla v. Beard*, 2005 U.S. LEXIS 4846 (2005).
[55] *Rompilla*, 359 F.3d at 274. (Sloviter, J., dissenting).
[56] 446 U.S. 668 (1984).
[57] *Rompilla*, 359 F.3d at 274. (Sloviter, J., dissenting).

> hands of a person who is without effective, professional, and zealous representation when accused of a crime. In my view, counsel here failed in all three areas.[58]

Citing eroding standards of effective assistance of counsel since *Strickland*, Judge Nygaard wrote that Judge Alito's "majority opinion … infuses our jurisprudence with this degraded standard."[59]

The Supreme Court, in a 5-4 opinion authored by Justice Souter, rejected Judge Alito's holding regarding the ineffective assistance claim. Justice O'Connor cast the decisive fifth vote. The court did not reach the question of the jury instruction regarding life without parole. Justice Souter found that defense counsel's performance fell below the level of reasonable performance set forth in *Strickland*. In particular, Justice Souter held that counsel was obligated to search for mitigating evidence in the court files from Rompilla's prior convictions – one of the aggravating factors the prosecution was going to use in support of its case for imposition of the death penalty. Those files contained evidence of Rompilla's abusive, impoverished childhood, adult alcoholism and schizophrenia. "Rompilla's counsel had the duty to make all reasonable efforts to learn what they could" about his earlier offense, wrote Souter, given that counsel knew that that offense was going to be used by the prosecution in its case for imposing the death penalty.[60]

Riley v. Taylor.[61] In *Riley*, the *en banc* Third Circuit granted a *habeas* petition based on a death row inmate's claim that the prosecution used racially-motivated peremptory strikes to remove African Americans from the jury, in violation of the Supreme Court's decision in *Batson v. Kentucky*.[62] In dissent, Judge Alito rejected the use of statistical evidence of peremptory challenges to strike black jurors in the case. Chief Judge Becker, concurring in Judge Sloviter's judgment, noted with concern the fact that there were no black jurors on four juries in a county with an 18% black population and a 9% black jury venire. Judge Alito flippantly analogized such evidence to the statistical oddity that five of the last six U.S. presidents have been left-handed. His analogy drew a sharp rebuke from the majority:

> [T]he Dissent's (sic.) attempt to analogize the statistical evidence of the use of peremptory challenges to strike black jurors to the percent of left-handed presidents … overlooks 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

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[58] *Rompilla*, 359 F.3d 310, 310 (3d Cir. 2004) (Nygaard, J., dissenting from denial of reh'g).
[59] *Id.* at 312.
[60] *Rompilla*, 2005 U.S. LEXIS 4846 at 22 (LEXIS pagination).
[61] 277 F.3d 261 (3d Cir. 2001).
[62] 476 U.S. 79 (1986).

> prospective black jurors and black defendants, which was the raison d'etre of the Batson decision.[63]

In fact, the majority noted, the state of Delaware – though it requested extra time to do so – filed no evidence that black jurors had actually served on the four first-degree murder trials in the county during the year that Riley, a black man, was tried before an all-white jury. Its failure to produce such evidence, noted Chief Judge Becker, concurring in the judgment, "sticks out like a sore thumb, and renders it doubtful that the 'record as a whole' supports the hearing judge's conclusions."[64]

The majority also criticized Judge Alito for giving short shrift to sister circuit precedents requiring state courts to provide more than a "terse" comment that the prosecutor has satisfied *Batson*.[65] Judge Alito would have accepted such a conclusory statement, rather than the more in-depth review of evidence mandated by "step three" of the *Batson* inquiry.

Ramseur v. Beyer.[66] Here Judge Alito again voted to deny *habeas* relief to a death-sentenced prisoner asserting *Batson* violations. The *en banc* Third Circuit had to decide in *Ramseur* whether the defendant's right to equal protection was violated when the assignment judge openly took potential grand jurors' race into account when selecting the grand jury. In selecting the jurors, the judge initially passed over at least two qualified African Americans, later seating two others. The judge acknowledged in open court that he was taking the potential jurors' race into account in order to attain what he believed to be a racially representative cross-section of the population of Essex County, New Jersey, where the crime took place.[67] The majority opinion, joined by Judge Alito (who also wrote a concurrence) held that the trial judge's actions, though distressing, did not impermissibly "infect" the proceedings to the extent that Ramseur's equal protection rights were violated.[68]

In his concurrence, Judge Alito went further than the majority in restricting Ramseur's right to challenge the proceedings, writing that Ramseur lacked standing to raise grand jurors' equal protection rights. The majority responded that his position "underemphasizes the community's interest in the jury selection process."[69]

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[63] *Riley*, 277 F.3d at 292.
[64] *Id*. at 317 (Becker, J., concurring in the judgment).
[65] *Riley*, 277 F.3d at 290 (quoting *U.S. v. Harris*, 192 F.3d 580, 588 (6th Cir. 1999)).
[66] 983 F.2d 1215 (3d Cir. 1992).
[67] The assignment judge's pertinent comment was included in the majority opinion:

> I don't mind telling you, ladies and gentlemen of the jury or the panel of the grand jury, I am trying to get a cross-section; and as you've probably noticed, I have asked two of the blacks who have indicated a willingness to serve to sit in the body of the courtroom [with others who have been disqualified]. I am deliberately trying to get an even mix of people from background and races, and things like that. And if any of you think that I am in any way being sneaky about it, please understand that I am not. I am telling you like it is, and that is the reason I have done what I have done. *Ramseur*, 983 F.2d at 1223.

[68] *See Ramseur*, 983 F.2d at 1229 n.11.
[69] *Ramseur*, 983 F.2d at 1228 n.8.

Judge Cowen dissented, writing that the majority's opinion "is a setback in our society's quest to eliminate discrimination from its justice system."[70] Joined by Judges Mansmann and Nygaard, she noted that, based on the record before the court, as many as five African-American jurors may have been discriminated against in the grand jury selection process.[71] Cowen expressed her belief that the court arrived at its result by reading Supreme Court precedents excessively narrowly and by "downplaying" what she called "degrading and dehumanizing" treatment of the prospective jurors.[72]

Whereas Judge Alito endorsed the assignment judge's concept of a "cross-section jury," Judge Cowen pointed out that, in addition to being subject to the judge's "arbitrary notion" of the correct proportion of any given racial group, such an approach in this case was used to unconstitutionally limit the number of African-Americans on the grand jury. Following the Supreme Court in *Cassell v. Texas*,[73] Judge Cowen would have held that "[e]ven if it was not motivated by malice toward any race, the judge's attempt to proportionally limit the number of African-Americans on the jury is purposeful discrimination in violation of the Equal Protection Clause."[74] Judge Cowen asserted that "the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors."[75]

Smith v. Horn.[76] Judge Alito dissented from a rather rare appellate reversal of a district court's partial denial of *habeas corpus* in a death penalty case. Finding a reasonable likelihood that the jury could have misunderstood its instructions with respect to the defendant's guilt, the court ordered the defendant released unless the state decided to retry him in the ensuing 180 days. Judge Alito would not have reached the merits of the claim, believing that the appeal should have been rejected on procedural grounds. Reaching the merits for the sake of argument, Judge Alito again departed from the majority, expressing his belief that the jury instruction ambiguity did not amount to a constitutional violation.

E. Reproductive Choice

Planned Parenthood of Southeastern Pennsylvania v. Casey.[77] The Third Circuit's decision in *Casey* was a significant decision, largely because it upheld a variety of new restrictions on a woman's right to choose an abortion. Pennsylvania's abortion statute was reported to be "one of the strictest in the nation."[78] The Third Circuit majority reversed the district court's finding that all of the Pennsylvania statute's restrictions were unconstitutional, and affirmed only as to the statute's "spousal notification" requirement, which it agreed was

[70] *Ramseur*, 983 F.2d at 1252 (Cowen, J., dissenting).
[71] *Id.* at 1248.
[72] *Id*. at 1246.
[73] 339 U.S. 282 (1950).
[74] *Ramseur*, 983 F.2d at 1249 (Cowen, J., dissenting).
[75] *Id*. at 1247 (quoting *Batson*, 476 U.S. at 88).
[76] 120 F.3d 400 (3d Cir. 1997).
[77] 947 F.2d 682 (3d. Cir. 1991) aff'd in part, rev'd in part, 505 U.S. 833 (1992).
[78] *See* Michael deCourcy Hinds, *Appeals Court Upholds Limits for Abortions*, NEW YORK TIMES, Oct. 21, 1991.

unconstitutional. Judge Alito wrote a separate concurrence/dissent that argued for a less stringent "rational basis standard" of review for abortion-related laws – a standard that Justice Blackmun later contended would be impossible to overcome.[79] Judge Alito alone concluded that all of the Pennsylvania restrictions, including the spousal notification provision, should be upheld as constitutional.

The *Casey* decision evaluated a number of restrictions on abortion under the Pennsylvania Abortion Control Act of 1982: (1) a narrow "medical emergency" exception; (2) a requirement that physicians supply "informed consent" information to women seeking an abortion; (3) a 24-hour waiting period requirement on adult women seeking an abortion after receiving the "informed consent" information; (4) a parental consent requirement for minors (with a judicial bypass); (5) reporting and public disclosure requirements for abortion clinics; and (6) a spousal notice requirement for adult women. The Third Circuit majority upheld the first five and struck down the spousal notification requirement, rejecting Judge Alito's dissent.

Most of Judge Alito's concurrence/dissent is devoted to an analysis of Justice O'Connor's many opinions in this area, and an extrapolation as to how he believed she would rule in the case. Judge Alito concluded that the spousal notification provision would only restrict a small subset of all women seeking abortions (*i.e.*, married women who would prefer not to tell their husbands that they wanted an abortion) and, therefore, any restriction on that subset neither imposed "severe limitations" on, nor "substantially limit[ed] access" to, abortions.[80] While noting that evidence that some women may face physical abuse as a result of this spousal notification requirement was "a matter of grave concern," Judge Alito brushed off the concern, writing that, "[w]hether the legislature's approach represents sound public policy is not for us to decide. Our task here is simply to decide whether Section 3209 meets constitutional standards."[81]

On appeal to the Supreme Court, a plurality of justices affirmed *Casey* in part and reversed in part, with separate opinions from Justices O'Connor (jointly with Justices Kennedy and Souter), Stevens, Blackmun, Rehnquist, and Scalia. The court voted 5-4 to affirm the ruling that the spousal notification provision was unconstitutional.

The Supreme Court decision provides a useful tool to evaluate Judge Alito's concurrence/dissent. First, in spite of Judge Alito's best efforts to predict how Justice O'Connor would rule in *Casey*, she co-wrote the Supreme Court's plurality decision that disagreed with his lengthy analysis and voted to affirm the Third Circuit's holding that the spousal notification was unconstitutional because it constituted an "undue burden."[82] The plurality decision analogized the spousal consent provision to long-discarded legal views, saying the provision brought to mind an 1872 case upholding a state ban on women lawyers in which "three Members of this

[79] *See Planned Parenthood v. Casey*, 505 U.S. 833, 941 (1992) (Blackmun, J., concurring in part, concurring in the judgment, and dissenting).
[80] *Casey*, 947 F.2d.at 721-24 (Alito, J., concurring and dissenting).
[81] *Id.* at 723-24.
[82] *See Casey*, 505 U.S. at 887-99 (Joint opinion by O'Connor, J., Kennedy, J., and Souter, J.).

Court reaffirmed the common-law principle that 'a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state … .'"[83] The plurality concluded that "[t]hese views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution."[84] Justice O'Connor also rejected Judge Alito's "rational relationship" test.[85] Additionally, the Supreme Court decision shows the similarity of approaches between Judge Alito and Justices Scalia, Rehnquist, Thomas and White. Chief Justice Rehnquist cited favorably to Judge Alito's dissent in his opinion. While Judge Alito's opinion struck a more measured tone, the standards recommended were the same, and while Judge Alito ignored *Roe v. Wade*, Justices Rehnquist, Scalia, Thomas and White urged outright that it should be overturned.

Planned Parenthood of Central New Jersey v. Farmer.[86] Nine years after the *Casey* decision, the Third Circuit addressed New Jersey's statute banning late-term abortions. In *Farmer*, the majority affirmed the district court's finding that the statute was unconstitutionally vague and created an "undue burden" on a woman's right to choose an abortion, a position consistent with virtually every other circuit court reviewing similar statutes. Judge Alito, however, refused to join in the majority opinion, instead filing a terse, one-page concurrence urging that the case be decided on a very narrow basis. In his concurrence, Judge Alito argued that the Supreme Court's then-recent decision in *Stenberg v. Carhart*,[87] which held unconstitutional any statute lacking an exception for the preservation of the health of the pregnant woman, compelled affirmance of the lower court's decision. Because the New Jersey statute did not include this exception, Judge Alito concluded that it must be struck down, but that everything else in the majority opinion was "never necessary and is now obsolete."[88] While concurring with the majority, Judge Alito's position in *Farmer* may point to an unwillingness to be associated with any pro-choice majority decision.

Alexander v. Whitman.[89] Here, the Third Circuit addressed the question of whether an unborn fetus is a "person" for 14th Amendment purposes under New Jersey's wrongful death statute. The majority, authored by Judge McKee, affirmed the lower court and concluded that pursuant to existing Supreme Court precedent, a fetus was not a "person" for 14th Amendment purposes. Judge Alito issued a two-paragraph concurring opinion, agreeing with the majority's conclusion that "the Supreme Court has held that a fetus is not a 'person' within the meaning of the Fourteenth Amendment."[90]

F. Antitrust

[83] *Id.* at 896-97.
[84] *Id.* at 897.
[85] *Id.*
[86] 220 F.3d 127 (3d Cir. 2000).
[87] 530 U.S. 914 (2000).
[88] *Farmer*, 220 F.3d at 152.
[89] 114 F.3d 1392 (3d Cir. 1997).
[90] *Alexander*, 114 F.3d at 1409 (Alito, J., concurring).

LePage's v. 3M Corp.[91] Judge Alito twice ruled on behalf of an admitted monopolist in a case that, had his position won the day, would have made it easier for large corporations to engage in practices designed to eliminate competition from smaller businesses. In *LePage's v. 3M*,[92] Judge Alito first voted with Judge Greenberg to create a majority on a divided three-judge panel. The majority held that 3M's use of certain rebate bundling techniques, though harmful to competitors with less diverse product lines than the scotch tape giant, did not violate the Sherman Antitrust Act because 3M did not sell transparent tape below cost. Judge Sloviter dissented, writing that the majority's approach would "weaken Section 2 of the Sherman Act to the point of impotence," and that her colleagues' holding would impose new hurdles for antitrust plaintiffs that would weaken marketplace competition.[93]

The Third Circuit heard the case *en banc* and rejected Judge Alito's approach. Six of the nine other judges who heard the case *en banc* agreed with Judge Sloviter, who wrote the 7-3 majority opinion, with Judge Alito joining Judge Greenberg in dissent.

[91] 324 F.3d 141 (3d Cir. 2003) (*en banc*).
[92] 277 F.3d 365 (3d Cir. 2002) *vacated by* 324 F.3d 141 (3d Cir. 2003) (*en banc*).
[93] *Id*. at 16, (Westlaw pagination).

G. First Amendment

1. Church-State

ACLU of New Jersey v. Schundler.[94] Judge Alito's majority opinion in *Schundler* reversed the district court and held that a modified holiday display – originally containing only a menorah and a creche – was not unconstitutional. Alito held that the addition of secular symbols such as Frosty the Snowman, Santa Clause, a Christmas tree and Kwanzaa symbols, was enough to prevent the display from creating an Establishment Clause violation.

Judge Nygaard wrote a lengthy dissent, arguing that both of the displays were unconstitutional. "I still conclude that the addition of a few small token secular objects is not enough to constitutionally legitimate the modified display," he wrote.[95] Judge Nygaard also took issue with Judge Alito's "parsing" of the applicable Supreme Court case law to reach a particular result, though he also acknowledged that there was "much confusion and plenty of room for jurisprudential disagreement in this area."[96]

ACLU of New Jersey v. Township of Wall.[97] In this case, factually similar to *Schundler*, the plaintiffs challenged the defendant township's religious holiday display – also containing a nativity display and menorah – as a violation of the Establishment Clause. The district court held that the display did not violate the 1st Amendment. The Third Circuit, in a unanimous opinion by Judge Alito, vacated the district court's decision and remanded plaintiffs' claims for dismissal for lack of standing to challenge the display. In his opinion, Judge Alito reasoned that the plaintiffs did not have standing based on their status as taxpayers because the display was entirely donated. Furthermore, Alito held, any expenditure by the Township in employee time to lighting elements of the display was *de minimis*.[98]

Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District.[99] A non-profit Bible-centered Christian evangelism group (Fellowship) sued a school district (Stafford) for viewpoint discrimination after one of the district's schools barred it both from distributing flyers and permission slips – through teachers – to students and from participating in "Back-to-School Night" events. Stafford countered that allowing the Fellowship such access to school resources would violate the First Amendment's Establishment Clause. The trial judge granted the Fellowship's request for a preliminary injunction against the school district, holding that its viewpoint discrimination claims would likely prevail over Stafford's Establishment Clause claims.

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[94] 168 F.3d 92 (3d Cir. 1999).
[95] *Id.* at 109 (Nygaard, J., dissenting).
[96] *Id.*
[97] 246 F.3d 258 (3d Cir. 2001).
[98] *Id.* at 264.
[99] 386 F.3d 514 (3d Cir. 2004).

The Third Circuit, in a unanimous opinion by Judge Alito, affirmed. Following the Supreme Court's 2001 decision in *Good News Club v. Milford Central School*,[100] Judge Alito held that Stafford "clearly engaged" in viewpoint discrimination by denying equal access to the Fellowship.[101] Furthermore, Judge Alito held, allowing the Fellowship equal access to school facilities would not violate the Establishment Clause. Applying the three-prong test from *Lemon v. Kurtzman*,[102] Alito found that permitting the group to participate would "inform families about the wide spectrum of activities from which they may choose and to foster the growth of diverse community groups."[103] He held that such a purpose was secular, did not primarily enhance nor inhibit religion and did not excessively entangle government with religion. Finally, Alito held that allowing equal access would not "coerce anyone to support or participate in religion or its exercise,"[104] as prohibited by the Supreme Court in *Lee v. Weisman*.[105]

Fraternal Order of Police Newark Lodge No. 12 v. City of Newark.[106] A group of devout Sunni Muslim police officers sued the city of Newark based on the police department's policy prohibiting men from wearing beards. The Third Circuit, in a unanimous opinion by Judge Alito, affirmed the district court's ruling that permanently enjoined the policy on the grounds that it violated the Free Exercise clause of the First Amendment.[107] Because the department made exceptions to the policy for secular (medical) reasons and did not provide substantial justifications for refusing to provide similar treatment for religious reasons, Judge Alito concluded that the policy must be struck down. Also writing for the majority in *Blackhawk v. Pennsylvania*,[108] Judge Alito held in a unanimous opinion that the Free Exercise Clause allowed a Native American Holy Man to keep bears for religious purposes without having to pay an administrative fee.

2. Free Speech

Banks v. Beard.[109] In *Banks*, the Third Circuit held that a prison policy of depriving "high-risk" inmates access to all non-religious and non-legal newspapers, magazines, and personal photographs was a violation of the inmates' free speech rights under the First Amendment. Judge Alito dissented, suggesting that the inmates could modify their behavior in order to have access to the materials.[110]

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[100] 522 U.S. 98 (2001).
[101] *Child Evangelism Fellowship*, 386 F.3d at 536.
[102] 411 U.S. 192 (1973).
[103] *Child Evangelism Fellowship*, 386 F.3d at 534.
[104] *Id*. at 535 (quoting *Lee v. Weisman*, 505 U.S. 477 (1992))
[105] 505.U.S. 477 (1992).
[106] 170 F.3d 359 (3d Cir. 1999).

[107] *Id.* at 360.
[108] 281 F.3d 202 (3d Cir. 2004).
[109] 399 F.3d 134 (3d Cir. 2005).
[110] *Id.* at 142 (Alito, J., dissenting).

Saxe v. State College Area School District.[111] This case involved an anti-harassment policy adopted by the State College Area School District (SCASD). The policy defined "harassment" as follows:

> verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.[112]

A group of Christian students challenged the anti-harassment policy as unconstitutional under the First Amendment, arguing that its enforcement would violate their right to freedom of speech. In particular, they alleged in their complaint that, given their Christian beliefs, they felt compelled to speak out against homosexuality.

Writing for a unanimous panel, Judge Alito reversed the district court and struck down the anti-harassment policy as violative of the Free Speech Clause of the First Amendment, concluding that the policy was "substantially overbroad" and did not "pose a realistic threat of substantial disruption" in the schools.[113]

The Pitt News v. Pappert.[114] The student newspaper at the University of Pittsburgh sought an injunction against the enforcement of a Pennsylvania statute banning advertisers from paying for the dissemination of alcoholic beverage advertisements by media associated with universities and other educational institutions. The Third Circuit, in a unanimous opinion by Judge Alito, reversed the district court, holding that the Pennsylvania statute violated the First Amendment. Judge Alito held that the statute was an unconstitutional restriction on commercial speech because it did not directly advance the asserted interest of reducing underage drinking and was not adequately tailored to achieve that objective, and because it improperly targeted a narrow segment of the media.

Sanguigni v. Pittsburgh Board of Public Education.[115] Public school teacher Phyllis Sanguigni wrote a paragraph in a faculty newsletter containing complaints about her school. Later, after receiving poor performance appraisals and being removed from her coaching positions, she filed suit, claiming violations of her First Amendment rights of free speech and free association, as well as due process violations. The district court dismissed her case. The Third Circuit, in a unanimous opinion by Judge Alito, affirmed the dismissal on the grounds that the teacher's statements did not constitute statements of public concern protected by the First

[111] 240 F.3d 200 (3d Cir. 2001).
[112] *Id.* at 202.
[113] *Id.* at 216-17.
[114] 379 F.3d 96 (3d Cir. 2004).
[115] 968 F.2d 393 (3d Cir. 1992).

Amendment, that the teacher's right to free association was not violated, and that the teacher had no right to due process or a protected property interest in her coaching position.[116]

Edwards v. California University of Pennsylvania.[117] Professor Dilawar Edwards alleged that his employer, the California University of Pennsylvania, deprived him of his rights of free speech, due process, and equal protection by restricting his choice of classroom materials, criticizing his teaching performance and suspending him without pay. Edwards had attempted to change the curriculum of a course he taught in order to emphasize bias, religion, censorship, and humanism. After students complained, the university intervened and ordered Edwards to cease his efforts to advance religious beliefs in the class. The district court dismissed Edwards' equal protection claim and granted summary judgment on his due process claims. At trial on the First Amendment and retaliation claims, the jury ruled in favor of the university. The Third Circuit affirmed in a unanimous opinion by Judge Alito. The Court concluded that Professor Edwards did not have a First Amendment right to choose classroom materials in contravention of university decisions.[118]

H. Immigration

In a series of divided decisions, Judge Alito has ruled against individuals seeking to remain in the United States to avoid persecution in their home country or simply seeking to remain here lawfully. In a pair of unanimous decisions, he wrote in favor of asylum seekers.

1. Asylum

Chang v. Ashcroft.[119] Judge Alito dissented from the court's grant of review of a claim for asylum. Vacating the BIA's dismissal of Chang's application for asylum, the court held that the Board impermissibly interpreted the Immigration and Naturalization Act and was mistaken in its decision to return Chang to China given the high likelihood of imprisonment constituting persecution. Judge Alito disagreed, suggesting that Chang deserved sympathy, not asylum.

Dia v. Ashcroft.[120] In this controversial case heard by the full Third Circuit, Judge Alito again dissented from the majority's opinion in favor of the asylum-seeker. The *Dia* majority held that an immigration judge's finding that the plaintiff lacked credibility was not supported by substantial evidence. Judge Rendell noted:

> Repeatedly, we are left wondering how the IJ reached the conclusions she has drawn. Her opinion consists not of normal drawing of intuitive inferences from a set of facts, but,

[116] *Id.* at 396-401.
[117] 156 F.3d 488 (3d Cir. 1998).
[118] *Id.* at 493.
[119] 119 F.3d 1055 (3d Cir. 1997).
[120] 353 F.3d 215 (3d Cir. 2003) (*en banc*).

> rather, of a progression of flawed sound bites that gives the impression that she was looking for ways to find fault with Dia's testimony.[121]

Judge Alito disagreed with this finding and dissented. He argued for a standard requiring an immigration judge's decision to be affirmed unless "no reasonable adjudicator" could find for the government.[122] Such a standard, wrote the majority, would "gut the statutory standard" and "ignore our precedent."[123]

Singh-Kaur v. Ashcroft.[124] Judge Alito joined an opinion upholding the Board of Immigration Appeals' reversal of an Immigration Judge's determination that the asylum-seeker should be granted asylum and not deported. The court upheld the BIA's order that Singh-Kaur be deported to India. At issue was the interpretation of the term "material support" for people engaged in terrorist activities within the meaning of the Immigration and Nationality Act (INA). Judge Fisher dissented, writing that "the majority's holding ignores the plain language of the statute by reading 'material' out of 'material support' [of terrorism]."[125] The "material support" provided by Singh-Kaur consisted of food and tents for a religious ceremony, and the two groups he was accused of supporting were not State Department-designated terrorist organizations, as required by the statute. Judge Fisher wrote:

> There is no doubt that sustenance, such as food and water, or maintenance, such as shelter, are necessary for life, but they are not per se necessary for terrorism. To hold differently would – in cases like this one, involving food and tents – automatically transmute mere 'support' into 'material support.' This would eviscerate the statute.[126]

Liu v. Ashcroft.[127] *Liu* involved an asylum application involving forced abortion. Judge Alito wrote a unanimous opinion holding that the Board of Immigration Appeals (BIA) erred by excluding evidence that would have supported a Chinese married couple's claims that the Chinese government had compelled Mrs. Liu to undergo two abortions. Immigration regulations require official documentation to prove such claims, but the Lius could not produce such documents. The case was remanded for further review requiring the allowance of such evidence.

Fatin v. INS.[128] Parastoo Fatin, an Iranian woman studying in the United States, applied to the Immigration and Naturalization Service for political asylum and later to prevent her deportation. She argued that her membership in a "particular social group" of "Iranian women who refuse to conform to the government's gender-specific laws and social norms"[129] and her

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[121] *Dia*, 353 F.3d at 250.
[122] *Id*. at 251 n.22.
[123] *Id*.
[124] 385 F.3d 293 (3d Cir. 2004).
[125] *Singh-Kaur*, 385 F.3d at 301 (Fisher, J., dissenting).
[126] *Id*. at 305.
[127] 372 F.3d 529 (3d Cir. 2004).
[128] 12 F.3d 1233 (3d Cir. 1993).
[129] *Id*. at 1241.

feminist "political opinion" were bases for a well founded fear that she would be persecuted if she returned to Iran.[130] Judge Alito, writing for a unanimous Third Circuit panel, found that women who hold feminist views and find Iranian gender-specific laws so abhorrent that they "refuse to conform" to them could qualify for asylum.[131] He ruled, however, that Ms. Fatin failed to show that compliance with Iran's laws and social norms would be "so deeply abhorrent to her that it would be tantamount to persecution"[132] or that she truly belonged to a group of "Iranian women who refuse to conform with those requirements even if the consequences may be severe."[133] Judge Alito justified his finding by pointing to Ms. Fatin's statements that she "would try to avoid" wearing the veil and would seek to avoid Islamic practices "as much as she could."[134]

[130] *Id*. at 1237.
[131] *Id*. at 1241
[132] *Id*.
[133] In her submissions to the court, Ms. Fatin cited several consequences of refusing to conform to Iranian law and social norms. For example, she noted the government's "imprisonment of any women caught in public without the traditional Islamic veil, the Chador" and "many instances [where] the revolutionary guards … take the law into their own hands and abuse the transgressing woman." *Id*. She also noted that the "routine penalty" for noncompliance with gender specific laws and social norms is "74 lashes, and in many cases brutal rapes and death."
[134] *Id*. at 1241.

2. Deportation

Sandoval v. Reno.[135] Dissenting, Judge Alito would have held that the Antiterrorism and Effective Death Penalty Act stripped federal courts of their jurisdiction to hear *habeas corpus* claims from aliens in custody challenging deportation orders. The Supreme Court rejected Judge Alito's position in *INS v. St. Cyr*.[136] Among other things, it concluded, contrary to Judge Alito, that eliminating federal court jurisdiction to hear such cases would raise serious constitutional questions concerning the Suspension Clause, which protects the right of *habeas corpus.*

Lee v. Ashcroft.[137] In *Lee*, Judge Alito dissented from the court's holding that filing a false tax return is not an aggravated felony mandating deportation. The majority wrote that Congress clearly intended that tax evasion be the only tax offense punishable by deportation. The court also cited Supreme Court precedent for the proposition that any ambiguity in deportation statutes be resolved in favor of the potential deportee, noting that Judge Alito's construction of legislative intent was grounded in "speculation."[138]

I. Civil Justice

In a couple of split decisions, Judge Alito has shown limited regard for the victims of accidents that could have been avoided had the responsible parties taken appropriate precautions.

Kleinknecht v. Gettysburg College.[139] In this case, brought by the parents of a young man who died of a heart attack sustained during varsity lacrosse practice, Judge Alito sided with a college claiming that it had no duty to anticipate that its student athletes might sustain serious injuries during team practices. Drew Kleinknecht was 20 years old when he died at varsity lacrosse practice at Gettysburg College. At the time of the incident, none of the team's coaches were trained in CPR, the nearest telephone was 200 yards away on the other side of an eight-foot fence, and there was no ambulance on the field. The Third Circuit reversed the district court, holding that the college should have foreseen that a member of the team could suffer serious injury during an athletic event, and that failure to protect against such a risk was unreasonable.

Judge Alito dissented, writing a brief paragraph in which he expressed full agreement with the district court's holding that the plaintiffs didn't provide enough evidence to establish a breach of duty by the college. At the heart of the district court's holding, however, was its reliance on a case, *Zanine v. Gallagher*,[140] easily distinguished from the Kleinknechts'. In *Zanine*, the defendant was a criminal suspect speeding away from a crime scene. The court in that case held that the heart attack suffered by an officer chasing the suspect was not foreseeable.

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[135] 166 F. 3d 225 (3d Cir. 1999).
[136] *INS v. St. Cyr*, 533 U.S. 289, 310 (2001).
[137] 368 F.3d 218 (3d Cir. 2004).
[138] *Lee*, 368 F.3d at 225 n.11.
[139] 989 F.2d 1360 (3d Cir. 1993).
[140] 345 Pa. Super. 119 (Pa. Super. Ct. 1985).

The district court, with which Alito agreed, took *Zanine* for the proposition that in order for a defendant to be liable under Pennsylvania law, an event must be more than "within the realm of possibility" to be foreseeable.[141] The Third Circuit majority disagreed, holding that in the context of analyzing one party's duty to another, a court cannot rule something unforeseeable as a matter of law unless the event falls under some broad class of events that itself is unforeseeable.[142] Because the college was aware of instances in which athletes died during athletic competitions, the court held, Drew was owed a duty entailing that reasonable precautions be taken to counter athletes' risk of death. The district court's definition of foreseeability, adopted by Judge Alito, "is too narrow," wrote the majority.[143]

Dillinger v. Caterpillar, Inc.[144] Alvin Dillinger suffered severe injuries when the brakes on the garbage truck he was driving failed and he was thrown through the truck's windshield. Dillinger brought a products liability action against the truck manufacturer based on the fact that the brake failure was caused by the rupture of exposed hydraulic hoses on the truck's underside. At trial, Dillinger argued that the truck was defective because it lacked a "belly pan" to protect the hoses and because there was no warning system to alert the driver when a hydraulic leak occurred.[145] The Third Circuit reversed the district court's ruling that allowed evidence that, by failing to use the alternative braking system and failing to read the operator's manual, Dillinger caused the accident. The court held that such evidence was improperly admitted in a strict liability case, where a plaintiff's alleged contributory negligence is legally irrelevant.

Judge Alito dissented, writing that the evidence, though inadmissible, should be allowed because it was elicited by the plaintiff's lawyer. This position, in the words of the majority, ignores "an insurmountable procedural difficulty": the defendant did not raise the issue at trial *or* on appeal.[146] "[W]e are quite clear that the proper application of the procedural rules as well as the interests of justice require that Dillinger… be granted a new trial at which prejudicial inadmissible evidence will not be heard by the jury."[147] Openly valuing "efficiency" and what he called "sound judicial administration" over the interests of justice and procedural standards cited by the majority, Judge Alito would have denied Mr. Dillinger a new trial.[148]

J. Challenging Base Closures

[141] *Zanine*, 345 Pa. Super. at 453.
[142] *Kleinknecht*, 989 F.2d at 1369.
[143] *Id*. at 1370.
[144] 959 F.2d 430 (3d Cir. 1992).
[145] *Contributory Negligence Info Nixed In Products Liability; Another Chance at Damages For Injured Driver*, THE LEGAL INTELLIGENCER, Mar. 10, 1992, at 9.
[146] *Dillinger*, 959 F.2d at 447.
[147] *Id*. at 448.
[148] *Id*. at 449 (Alito, J., dissenting).

Specter v. Garrett.[149] On the controversial topic of military base closures, Judge Alito dissented twice from a panel majority, stating his belief that the Base Closure and Realignment Act (BCRA) did not provide for judicial review of base closings. The case was brought by Senator Arlen Specter, now Chairman of the Senate Judiciary Committee, who argued the case before the Third Circuit and the Supreme Court. A majority of the Third Circuit twice disagreed with Judge Alito – the second time on remand from the Supreme Court – but his position was eventually vindicated on a second appeal to the Supreme Court.[150] All nine justices agreed with Judge Alito that BCRA precluded judicial review of base closures, with Justice Rehnquist citing to Judge Alito's dissent below, and Justice Souter, in concurrence, echoing Judge Alito's acknowledgment that Congress' experience with wastefully delayed base closures was behind the act's textual and structural preference for "quick and final" closure proceedings.[151]

[149] 971 F.2d 936 (3d Cir. 1992) reh'g denied 1992 U.S. App. LEXIS 11651 (3d Cir. 1992) (*en banc*), vacated and remanded by *O'Keefe v. Specter*, 506 U.S. 969 (1992), on remand at *Specter v. Garrett*, 1995 F.2d 404 (3d Cir. 1993), reh'g denied 995 F.2d 404 (3d Cir. 1993), rev'd by *Dalton v. Specter*, 511 U.S. 462 (1994) reh'g denied 512 U.S. 1247 (1994).

[150] *Dalton v. Specter*, 511 U.S. 462 (1994) reh'g denied 512 U.S. 1247 (1994).

[151] *Dalton*, 511 U.S. at 479 (Souter, J., concurring); and See *Specter*, 995 F.2d at 414 (Alito, J., dissenting).