The COMMITTEE for JUSTICE
1275 Pennsylvania Avenue, NW
Tenth Floor
Washington, DC 20004
www.committeeforjustice.org

Judge Alito's Record: Restraint, Commitment to Precedent, Faithful Application of the Law*

* This report was produced by the Committee for Justice, including contributions by Executive Director Sean Rushton, General Counsel Curt Levey, and Research Director John Kalinger.

Executive Summary

With each Republican nominee to the Supreme Court – from Sandra Day O'Connor to John Roberts – attacks by liberal interest groups such as People for the American Way (PFAW) have become increasingly histrionic. Now the Left has trained its fire on Judge Samuel A. Alito, Jr. Despite the attacks, it would be difficult to imagine a candidate better suited to the High Court than Judge Alito. The son of an Italian immigrant and of two public-school teachers, Alito boasts an impeccable academic pedigree and has dedicated his career to public service, including fifteen years as a judge on the U.S. Court of Appeals for the Third Circuit. Notably, Judge Alito has more prior judicial experience than any Supreme Court nominee in the past 70 years.

As this report demonstrates, Judge Alito's record reveals him to be a thoughtful, restrained, and impartial jurist who avoids judicial policymaking. He decides the cases that come before him on the basis of the facts and the law – including precedent – without regard to his personal preferences on policy or outcome. While these characteristics are evident throughout Judge Alito's opinions, this report focuses on those issue areas where liberal interest groups have chosen to aim their attack, specifically:

Privacy: Judge Alito's record shows that he does not approach cases implicating privacy with a predetermined viewpoint. Instead, he decides such cases based on his understanding of what the law requires. On the issue of abortion rights, Alito voted on the pro-choice side in three of the four abortion cases in which he participated, and on the pro-life side in the fourth case. In other words, Judge Alito is neither a pro-life nor pro-choice judge, but a pro-law judge. And in a much-ballyhooed case involving the search of a 10-year old girl, the Left's only real complaint is that Alito declined to substitute his judgment for that of the police concerning the necessity of determining whether a drug dealer had hidden drugs on his daughter.

Constitutional Limits on Federal Power: In federalism cases, Judge Alito's fidelity to Supreme Court precedent and the Constitution's limits on federal power are being outrageously miscast as evidence that he opposes the federal ban on machine guns and the Family and Medical Leave Act.

Race and Sex Discrimination: Despite the Left's description of Alito's rulings on race and sex discrimination as "especially harsh," an examination of his record evinces a scholarly command of this complex area of the law, as well as an even-handed treatment of both plaintiffs and defendants.

Age and Disability Discrimination: Judge Alito is similarly evenhanded in his consideration of age and disability discrimination claims. While that is not enough to satisfy critics of his record – who seem to believe that the disabled should win every case they bring – the truth is that Alito has decided many such cases in favor of disabled plaintiffs.

Other Labor and Employment Cases: Liberal special interest groups complain that Judge Alito's record in cases concerning "worker protection" is "mixed." What that really tells us is that Alito is not an outcome-oriented judge. In other words, he decides cases based on the facts and the law, not on what outcome he desires.

Religious Liberty: Judge Alito has struck down a variety of regulations that imposed unique burdens or outright restrictions on those wishing to express their religious views. Recognizing that the First Amendment's guarantee of religious liberty is not just for Christians, Alito has shown special sensitivity to the rights of religious minorities, such as Muslims and Native Americans.

Freedom of Speech: The "PC police" on the far Left sound the alarm because Judge Alito's opinions suggest "that student speech about morality and 'sin' should not be restricted even when it may offend others." But Judge Alito recognizes that protecting free speech even when others may disagree or be offended is precisely what the First Amendment is all about.

Prisoner Litigation: In a number of cases, Judge Alito has safeguarded the rights of prisoners – particularly inmates who claim that their convictions were tainted by racial discrimination. At the same time, Alito's record demonstrates that he grants appropriate deference to the judgment of officials charged with determining how best to run a prison.

Immigration Laws: Because they reflect his usual commitment to applying the law impartially, Judge Alito's opinions in this area fail to satisfy critics on the left who seem to think that every request for asylum should be granted. Never mind that Alito's application of the law has sometimes resulted in a broad view of eligibility for asylum and, in one case (*Fatin v. INS*), resulted in a legal rule that ensures that women who have suffered persecution abroad because of their gender or feminist beliefs will find a safe haven in the United States.

Distortion of Alito's Record

Despite Judge Alito's scholarly and evenhanded record across a wide variety of legal issues, liberal interest groups continue to try to portray him as out of the mainstream. That is no easy task, but here is how they do it. Like any impartial judge who hears hundreds of cases, there are numerous instances in which Alito has ruled against the type of parties favored by the Left – discrimination plaintiffs, aliens seeking asylum, prisoners, and the like. Similarly, there are numerous instances in which Alito has ruled in favor of such parties. Alito's critics on the left have taken advantage of this complex picture – conveniently ignoring the latter set of opinions, while reflexively attacking the former ones regardless of their legal reasoning – all in an effort to paint Alito as a judge who disfavors the "little guy."

The liberal interest groups arrayed against Judge Alito do not stop there. Even among the cherry-picked cases that they focus on, the Left chooses to ignore abundant evidence that Alito's legal analysis is well within the mainstream of American law. Examples of the types of evidence they overlook are:

- Alito's opinion spoke for a unanimous 3-judge panel or a lopsided full-circuit majority (in full report below, see, e.g., *Chittister*, *Keller*, *Hopp*, *Watson*, *Pemberthy*, *Poole*, *Saxe*, *Bolden*, *Sanguigni*).
- Democratic appointees on the Third Circuit agreed with Alito (see, e.g., *Chittister*, *Keller*, *Poole*, *Dia*, *Saxe*, *Schundler*).
- Other federal appeals courts agreed with Alito (see, e.g., *Chittister*, *Sheridan*, *Watson*, *Pemberthy*, *Rappa*).
- Alito's ruling was consistent with public opinion and the will of the public's elected representatives (see, e.g., *Casey*).

Alito's critics further distort the implications of his opinions by ignoring factors such as:

- The case turned on issues of a technical nature – such as burdens of proof, deadlines, complaint specificity, and warrant requirements – rather than on the substantive (and often emotional) issues Alito's critics point to (see, e.g., *McArdle*, *Bray*, *Sheridan*, *Poole*, *Groody*).
- Alito's opinion was based on the deference a federal appeals court must show to lower federal courts (*Bhaya*, *Glass)*, state courts (*Pemberthy*), administrative law judges (*Grant*, *Chang*, *Dia*), and prison officials (*Banks*, *Fraise*).

Other Lines of Attack

Having failed to make any headway with the public through distortions of Judge Alito's substantive record, his critics are now trying to smear him with baseless ethics allegations. Specifically, they argue that Alito – who has money invested in Vanguard funds – should not have sat on a case in which a bankrupt party and her creditors were fighting over assets which had incidentally been held by Vanguard. However, a review of the facts and the governing federal ethics statutes, and an analysis by leading independent ethics experts, demonstrate that Judge Alito violated none of his ethical responsibilities. Moreover, as soon as Alito became aware of the possible conflict, he asked that the case be turned over to a new panel of judges.

The Left's assault on Alito has not been limited to his judicial record. His critics have gone so far as to attack statements he made in a 20 year old job application, five years before he became a judge. Most notably, they have pointed hysterically to his 1985 statement that he was "proud of [his] contributions in recent cases in which the government has argued . . . that the Constitution does not protect a right to an abortion."

This is much ado about nothing for a number of reasons. First of all, it is unreasonable to evaluate Judge Alito based on a decades-old statement rather than on his fifteen year record on the federal bench. That record – including ruling for the pro-choice side in three out of four cases – demonstrates that he puts his personal views aside when deciding cases. Moreover, the apparent basis for Alito's statement, a belief that *Roe v. Wade* was poorly reasoned, is widely held by legal scholars on both the right and the left. Finally, if expressing a view for or against a constitutional right to abortion were an appropriate bar to Supreme Court confirmation, Justices Stephen Breyer and Ruth Bader Ginsburg would not be on the Court today. Instead, both were overwhelming confirmed by the Senate despite having made their views on the issue clear.

Conclusion

This report demonstrates that, once again, the Left's attack on a Supreme Court nominee is based on distortion and hysterics, rather than on reality. The truth is that Judge Alito's judicial record reveals him to be an evenhanded, restrained, and thoughtful jurist who puts his personal preferences aside and leaves policymaking to the people's elected representatives in Congress and the states. Judge Alito will be a credit to the Supreme Court when he dons the judicial robe, and we call on the Senate to confirm him expeditiously.

For liberal interest groups such as People for the American Way (PFAW), the Alliance for Justice, and the Leadership Conference on Civil Rights, the Supreme Court was at its best in the 1960s and '70s when judicial activism was riding high.

Since then, the sky has been falling consistently for the liberal left. Starting with President Ronald Reagan, Republican-appointed federal judges have generally eschewed judicial activism and practiced constitutionalism and judicial restraint.

Fearing a non-political court that applies the law but does not legislate it, the liberal groups have poured their energy into attacking constitutionalist nominees to the federal appellate courts and the U.S. Supreme Court.

Now the Left has trained its fire on Judge Samuel A. Alito, Jr., the President's pick to sit on the Supreme Court.[1] Given the Left's previous distorted characterizations of Republican Supreme Court nominees, why should anyone believe their claims about Judge Alito now?

The fact is that it would be difficult to imagine a nominee better suited for the High Court than Judge Alito. The son of an Italian immigrant (and of two public-school teachers), Judge Alito has an impressive academic pedigree, with degrees from Princeton and Yale Law School. He had dedicated his career to public service, working as a federal prosecutor, a Justice Department official, and, for the past fifteen years, as a judge on the Philadelphia-based U.S. Court of Appeals for the Third Circuit. In fact, he has more prior judicial experience than any Supreme Court nominee in the past 70 years.

Even more important is that Judge Alito's record reveals him to be a thoughtful, restrained jurist who shows an aversion to judicial policymaking. He decides the cases that come before him on the basis of the law and the facts, and leaves the legislating to the people's elected representatives in Congress and the States. Judge Alito will be a credit to the Supreme Court when he dons the judicial robe, and we call on the Senate to confirm him expeditiously.

A "Pro Law" Judge: Judge Alito's Privacy Record

Since Judge Alito does not engage in results oriented jurisprudence he does not decide cases "for privacy" or "against privacy"; he decides them based on his understanding of what the law requires. His willingness to follow the law wherever it leads explains why an independent analysis by the *Christian Science Monitor* found that, "of the four abortion cases in which he participated as an appeals court judge, he voted on

[1] See People for the American Way, The Record of Samuel Alito: A Preliminary Review (Oct. 31, 2005) ("PFAW Report").

the pro-choice side in all but one."[2] In other words, Judge Alito's "record is neither that of a 'pro-life' or 'pro-choice' judge, but of a 'pro-law' judge."[3]

One such "pro-law" ruling is Judge Alito's concurrence in *Planned Parenthood v. Farmer*, 220 F.3d 127 (3d Cir. 2000). In that opinion, Judge Alito agreed to strike down New Jersey's ban on partial-birth abortion. The Supreme Court previously had invalidated a similar Nebraska law, and Judge Alito emphasized the "responsibility" of judges "to follow and apply controlling Supreme Court precedent." This demonstrates that Judge Alito shows due deference to prior rulings of the Supreme Court notwithstanding his personal views, whatever they may be.

Judge Alito joined another "pro-law" opinion in *Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995). That case presented a technical and arcane question of administrative law – whether administrative agencies are entitled to judicial deference when they adopt polices through informal means (like an opinion letter), as opposed to more formal notice-and-comment rulemaking. Judge Alito concluded that agencies *are* entitled to deference in those circumstances. He therefore agreed that two Pennsylvania abortion regulations were preempted by the interpretation of the Hyde Amendment (a federal statute governing the availability of Medicaid funds to pay for abortions) announced by the Department of Health and Human Services. Once again, Judge Alito refused to use a case that indirectly dealt with abortion as a platform for imposing his views on the issue.

Of course, Exhibit A in the Left's bill of particulars is Judge Alito's partial dissent in *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991). In that case, Judge Alito and his Third Circuit colleagues – and later the Supreme Court – agreed that three of the four Pennsylvania laws at issue in that case were perfectly constitutional. Specifically, the appellate court unanimously held that states can: (1) require that information be given to women considering abortion to enable them to make an informed choice; (2) prevent minor girls from having abortions unless a parent approves; and (3) oblige abortion providers to publicly report certain non-confidential information. Each of these holdings was upheld by the Supreme Court.

The only issue on which Judge Alito parted company from his colleagues was the permissibility of a law requiring that, unless one of several exceptions applied, a married woman seeking an abortion had to sign a form indicating that she informed her spouse. (Note that the law didn't require the woman to get her spouse's *permission*. Nor did the law require her to actually notify her spouse; she simply had to sign a form stating that she had done so.) Judge Alito engaged in a lengthy analysis of Justice O'Connor's prior abortion-related writings and by applying existing precedent sustained the spousal-notification requirement. Ultimately, a majority on the Supreme Court disagreed, and the law was invalidated. But there can be no doubt about Judge Alito's good-faith effort to scrupulously apply the High Court's past decisions.

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[2] Warren Richey, *On Abortion, a Nuanced Stand*, CHRISTIAN SCIENCE MONITOR, Nov. 2, 2005.

[3] Jonathan H. Adler, *A Brilliant Judicial Mind*, WALL ST. J., Nov. 1, 2005.

It goes without saying that spousal-notification laws like Pennsylvania's enjoy wide popularity among the American people. When Gallup in 1992 – the same year the Supreme Court handed down its *Casey* decision – "asked people whether they favored or opposed a law requiring that the husband of a married woman be notified if she decides to have an abortion, 73 percent said they were in favor." Levels of support have remained stratospheric ever since. "In 1996, 70 percent were in favor, and in 2003, 72 percent were." Only about a quarter of Americans oppose such laws.[4]

The spousal-notification requirement also commanded strong bipartisan support from Pennsylvania lawmakers. Signed into law by a Democratic governor in 1989, the legislation (Senate Bill 369) passed the Democrat-controlled House by an impressive 143-58 margin, including 67 of the chamber's 101 Democrats. The vote in the Senate was similarly lopsided: 33-17, including a majority of the Democrats. If Judge Alito is unfit for the Supreme Court because he concluded that spousal-notification laws pass constitutional muster, then three-quarters of the American people are too extreme for the Left's taste. Who's the radical here?

Predictably, much has been made of then Assistant Solicitor General Alito's comments in a 1985 job application to be Deputy Assistant Attorney General that he was "proud of [his] contributions in recent cases in which the government has argued…that the Constitution does not protect a right to an abortion." However, the media reports and left-wing accusations are much ado about nothing.

First, the application was written just twelve years after *Roe*, before the Supreme Court's *Casey v. Planned Parenthood* decision affirmed that there is a constitutional right to abortion. Judge Alito has shown himself to be a judge who gives *stare decisis* its full and proper respect. The last twenty years of Supreme Court precedent will surely factor into his reasoning as a Supreme Court justice.

Second, as discussed above, there is no indication that his judicial opinions have reflected any personal views he may have concerning abortion. Instead, he has made every attempt to follow Justice O'Connor's "undue burden" standard, including ruling against what would have to be considered the "pro-life" position in *Planned Parenthood v. Farmer* and *Blackwell Health*. When it comes to privacy, Judge Alito's record is clearly one of modesty and judicial restraint, not that of an activist who imposes his own policy preferences on the law.

Third, it would be unreasonable to evaluate Judge Alito based on a twenty year old statement rather than his fifteen year record on the federal bench, during which time he has written many hundreds of opinions. It is by that record as a *judge*, rather than by a job application written in 1985, that his judicial philosophy and temperament should be measured. Before being nominated to the High Court, Justice Ruth Bader Ginsburg had

[4] Karlyn Bowman, *What the Public Thinks About One Key Issue in Alito's Nomination*, ROLL CALL, Nov. 2, 2005.

advocated some views that would be considered by many to be out of the "mainstream," such as the abolition of Mother's and Father's Days, co-ed prisons, and a constitutional right to prostitution and polygamy.[5] However, the Senate properly evaluated her nomination based on her extensive record as a judge, not her previous record as an advocate.

Fourth, Judge Alito's criticism of the view that abortion is a constitutional right should not be a bar to his confirmation, just as comments supporting the right to abortion were not a bar to the confirmation of Justices Stephen Breyer and Ginsburg, both of whom received an overwhelming majority of votes in the Senate. The Senate should uphold the same standard for both Republican and Democratic nominees to the Court and not impose a litmus test – especially a one-sided test – on abortion or any other issue.

Finally, the idea that *Roe v. Wade* was poorly reasoned is widely held by legal scholars and judges both on the right and the left. Liberal law professors such as Laurence Tribe, Cass Sunstein, and Alan Dershowitz have been critical of *Roe* as an example of judicial activism and overreach.[6] Indeed, even Justice Ginsburg, in a law review article in 1985 – the same year as Judge Alito's application – stated that Roe's "[h]eavy handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."[7]

By now it should come as no surprise that left-wing groups' characterization of Judge Alito's dissent in *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004), a case involving a search for illegal drugs, is a gross distortion. In *Doe*, police officers obtained from a judge a warrant to search John Doe's residence for drug paraphernalia. The accompanying warrant application sought permission to search all occupants of the house – on the reasonable theory that drug dealers often secret their wares on others' persons in order to evade detection. However, the warrant's description of the persons and places to be searched only listed John Doe and his residence, apparently because the box on the form was too small to fit the rest of the information. When executing the warrant, a

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[5] Ruth Bader Ginsburg and Brenda Feigen Fasteau, "The Legal Status of Women under Federal Law," Columbia Law School Equal Rights Advocacy Project (1974)(available at: http://www.eppc.org/publications/pubID.2363/pub_detail.asp)

[6] Laurence Tribe, Professor of Law at Harvard who represented Al Gore in 2000 said, "One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found." *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harvard Law Review 1, 7 (1973). Cass Sunstein, Professor of Law at the University of Chicago and a Democratic adviser on judicial nominations has made some interesting comments about the *Roe*'s status as "super-duper precedent" when he admitted, "What I think is that it just doesn't have the stable status of *Brown* or *Miranda* because it's been under internal and external assault pretty much from the beginning…. As a constitutional matter, I think *Roe* was way overreached." Quoted in: Brian McGuire, *Roe v. Wade an Issue Ahead of Alito Hearing*, New York Sun November 15, 2005. Alan Dershowitz, Professor of Law at Harvard, has likened *Roe* to the *Bush v. Gore* decision, which he has fiercely criticized. *Supreme Injustice: How the High Court Hijacked Election 2000* (New York: Oxford) 2001, p. 194.

[7] Ruth Bader Ginsburg, *Essay: Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. 375, 385 (1985).

female officer took Jane and Mary Doe (John Doe's wife and 10-year-old daughter, respectively) to a private room and searched them for drugs, asking them to shift or remove various articles of clothing. This is hardly the invasive "strip-search" that PFAW bewails.

The issue in *Doe* had nothing to do with whether the wife and daughter could be strip-searched. The fact that the search involved a female police officer asking Jane and Mary Doe to adjust their clothes simply was not relevant to the outcome of the case. Instead, the issue was a mundane and technical question of criminal law: How precisely must a search warrant incorporate the terms of an accompanying application?

Disagreeing with his colleagues' decision to invalidate the search, Judge Alito paid heed to the Supreme Court's instructions that applications for search warrants must be read "in a commonsense and realistic fashion." *United States v. Ventresca*, 380 U.S. 102, 108 (1965). His basic point was that the warrant should not be interpreted in a "technical and legalistic" way. The police officers in their application specifically indicated that they intended to search all occupants of the Doe residence. The only reason they didn't repeat that request in the search warrant itself was because the relevant box on the warrant was not large enough.

In the end, PFAW's complaint about *Groody* amounts to this: Judge Alito did not impose on the police a judge-created policy that it is better not to search the children of drug dealers, a policy that may well result in dealers having carte blanche to use their children as mules. Only one determined to close his eyes to reality – like PFAW – could regard *Doe* as evidence that Judge Alito favors strip-searches of ten-year-olds. If anything, *Doe* demonstrates that Judge Alito is not hide-bound to hyper-technical, literalist methods of interpreting legal texts.

A Strong But Not Omnipotent Federal Government

Liberals' distortions of Judge Alito's dissent in *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), are tendentious and misleading in the extreme. First, *Rybar* was not a "gun control" case. Nor, despite defendant Rybar's game attempt to make it so, was it a Second Amendment case. *Rybar* centered on the scope of Congress's power under the Constitution's Commerce Clause.

At the time the Third Circuit heard *Rybar*, the Supreme Court in the *Lopez* case had indicated that Congress's Commerce Clause power, though broad, was not without its limits. Judge Alito noted that while the majority wanted to strictly limit *Lopez* to "its own peculiar circumstances," the court had a "responsibility to apply Supreme Court precedent." It is improper to draw any conclusion from *Rybar* as to what Judge Alito's position, whether personal or legal, on gun control might be. For example, Judge Alito pointed out that even if the federal statute in question was struck down, that "would not preclude adequate regulation of the private possession of machine guns. Needless to say, the Commerce Clause does not prevent the states from regulating machine gun possession, as all of the jurisdictions within our circuit have done."

Judge Alito's *Rybar* dissent also emphasized that federal courts are not supposed to be the taskmaster of Congress. He specifically wrote that, "[o]f course, Congress is not obligated to make findings" of fact for a piece of legislation to be sustained. He did, however, follow the Supreme Court's guidance in *Lopez*, which held that congressional factual findings would have been helpful in aiding the Court's evaluation of Congress's authority to enact the statute in question. In other words, Judge Alito was doing no more than faithfully seeking to apply governing precedent from the Supreme Court. He also properly noted that Congress never even bothered to identify the source of its constitutional authority to enact the statute challenged in *Rybar*.

In addition to suggesting that congressional findings could have saved the statute, Judge Alito also indicated that Congress could have shored-up the law's constitutionality by adding a jurisdictional element – i.e., making plain that Congress was only seeking to regulate those firearms-related activities that impact interstate commerce. Judge Alito emphasized that a jurisdictional element is "a common feature of federal laws in this field and one that has not posed any noticeable problems for federal law enforcement." He also correctly noted that the lack of a jurisdictional element was one of the reasons why the Supreme Court in *Lopez* struck down the law as unconstitutional. These are the hallmarks of a fair-minded judge.

The Left's distortions of *Chittister v. Department of Community & Economic Development*, 226 F.3d 223 (3d Cir. 2000), suffers from equally fatal flaws. In that case, a unanimous panel of the Third Circuit voted to strike down portions of the Family Medical Leave Act ("FMLA") as an unconstitutional abrogation of the immunity from lawsuits which states enjoy under the Eleventh Amendment. It bears emphasis that Judge Alito was the only Republican-appointed judge on the three-member panel. He was joined by Judge McKee (a Clinton appointee) and Judge Fullam (a Johnson appointee), both of whom agreed that the relevant parts of the statute were unconstitutional.

That Judge Alito was joined by two Democrats is powerful evidence that he was doing no more than seeking to apply the Supreme Court's recent pronouncements in this area of law. At the time *Chittister* was decided, the High Court had decided a number of cases, stretching back over a century, indicating that Congress does not enjoy an unchecked power to abrogate the states' sovereign immunity. *See, e.g.*, *Hans v. Louisiana*, 134 U.S. 1 (1890); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Florida Prepaid v. College Savings Bank*, 527 U.S. 627 (1999); *Alden v. Maine*, 527 U.S. 706 (1999); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *University of Alabama v. Garrett*, 531 U.S. 356 (2001). In each case, the Court held that Congress improperly attempted to abrogate the states' Eleventh Amendment sovereign immunity.

The Third Circuit was far from the only federal court to interpret these precedents as casting doubt on the constitutionality of the FMLA. Indeed, a number of circuits from around the country – including the First, Second, Fourth, Fifth, Sixth, and Eighth Circuits – held that the FMLA did not abrogate the states' Eleventh Amendment immunity. *See*

Laro v. New Hampshire, 259 F.3d 1 (1st Cir. 2001); *Hale v. Mann*, 219 F.3d 61 (2d Cir. 2000); *Montgomery v. Maryland*, 266 F.3d 334 (4th Cir. 2001); *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000); *Sims v. University of Cincinnati*, 219 F.3d 559 (6th Cir. 2000); *Townsel v. Missouri*, 233 F.3d 1094 (8th Cir. 2000).

To be sure, the Supreme Court in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), later ruled that a different section of the FMLA did represent a valid abrogation of the states' Eleventh Amendment immunity. However, *Hibbs* is plainly distinguishable from *Chittister*, as the Supreme Court and several courts of appeals have recognized. (*Chittister* dealt with a worker's right under the FMLA to take sick leave for him- or herself; *Hibbs* dealt with a worker's right to take leave to have a child or care for family members. Because women often exercise the latter set of rights, and because Congress has the power to combat gender-based stereotypes, the Supreme Court in *Hibbs* employed a more generous standard of review than would apply in ordinary FMLA cases like *Chittister*.) The fact that so many federal judges agreed with Judge Alito – including countless Democratic appointees – demonstrates that his ruling fits comfortably within the mainstream of American law.

Scholarly and Equitable Consideration of Race and Sex Discrimination Claims

Judge Alito's opinions applying civil rights and non-discrimination statutes evince a scholarly command of this complex area of law and an even-handed treatment of both plaintiffs and defendants. Virtually all of his rulings are consistent with holdings of other federal appellate courts, showing his interpretations to be well within the mainstream of the federal bench. Most importantly, Judge Alito's analysis consistently displays a careful fidelity to the statutory text, congressional intent, and governing Supreme Court precedent.

Judge Alito's sensitivity to the issue of discrimination – in particular, gender-based discrimination – is evidenced in *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993). In that case, an Iranian woman petitioned for asylum. Writing for the court, Judge Alito ruled that a woman would be entitled to asylum in the United States if she introduced sufficient evidence that compliance with Iran's "gender specific laws and repressive social norms" – such as the requirement that women wear a veil in public – would be deeply abhorrent to her. Judge Alito also indicated that asylum would be available to a woman who could show that she would be persecuted in her home country because of her gender, because of her commitment to feminism, or because of her membership in a feminist group. The court ultimately concluded that the woman in that particular case had not introduced enough evidence to establish that she had a well-founded fear of persecution, and that she therefore was not entitled to asylum. But the legal rule Judge Alito articulated in *Fatin* ensures that women who show they have suffered persecution on account of their gender or feminist beliefs will find a safe haven in the United States.

Judge Alito's rulings in civil rights cases have been breathlessly described by those on the Left as "especially harsh." But this overblown rhetoric is betrayed by even a cursory examination of the Judge Alito's record. The Left's apparent strategy is to

mischaracterize and distort Judge Alito's record in the hopes that its readers are too lazy to examine the cases for themselves.

For example, in their preliminary report on Judge Alito PFAW singles out his dissent in *Glass v. Philadelphia Elect. Co.*, 34 F.3d 188 (3d Cir. 1994), as somehow reflecting a less-than-sterling commitment to civil-rights laws. In reality, the case involved a technical question of appellate review – did the "abuse of discretion" standard that applies when an appellate court reviews certain lower court rulings require the Third Circuit to uphold a disputed evidentiary ruling by the district court? Judge Alito concluded that the trial court's ruling should be sustained. There's nothing radical about this concept; the notion that trial courts' evidentiary rulings are entitled to special deference on appellate review has been a cardinal principle of the American legal system for centuries.

Another case that has been distorted is *Watson v. SEPTA*, 207 F.3d 207 (3d Cir. 2000). Here, writing for a unanimous panel, Judge Alito upheld a jury verdict in an employment discrimination case, finding that the lower court did not commit reversible error when giving instructions to the jury. It bears noting that Judge Alito's opinion simply followed the interpretation announced by the only two circuits to have previously considered the issue. And his opinion drew heavily on a prior concurrence by Justice O'Connor, which Congress subsequently ratified in a later amendment to Title VII.

The next case in the parade of horribles is *Sheridan v. E.I. DuPont de Nemours and Co*., 100 F.3d 1061 (3d Cir. 1996) (en banc), in which Judge Alito dissented from an *en banc* decision of the Third Circuit. The *Sheridan* decision turned on a difficult question that had split the circuits and that involved the complex burden-shifting scheme of presumptions and inferences that courts apply in determining whether a Title VII claim should go to trial. Judge Alito simply interpreted the Supreme Court's much-disputed language in a previous case as requiring that a Title VII plaintiff who makes a specified (and a relatively low) showing should "usually" – but not necessarily "always" – be permitted to go to trial. Judge Alito's dissent noted that "[i]f the majority had merely said that, under the circumstances described above, a defense motion for summary judgment or judgment as a matter of law must generally be denied, I would agree," but he found the "blanket rule" adopted by the majority to be legally "unsound." Judge Alito was far from the only circuit court judge to reach that conclusion – the same outcome also was reached by unanimous panels of the First and Eleventh Circuits, and by 16 out of 17 Fifth Circuit judges sitting *en banc*. Finally, four years later, in an opinion written by Justice O'Connor, a unanimous Supreme Court agreed with Judge Alito's position in *Reeves v. Sanderson Plumbing Products, Inc.*, 150 U.S. 133 (2000).

Liberal special interest groups and politicians seem particularly incensed by Judge Alito's dissent in *Bray v. Marriott Hotels*, 110 F.3d 986 (3d Cir. 1997), but what they do not understand is that what divides Judge Alito from the majority in this case is Judge Alito's belief that claims of discrimination require evidence of actual discrimination and not an employer's mere non-compliance with its own internal procedures. Bray, an African-American female and a Marriott employee, had applied for

a promotion, along with several other hotel employees. Marriott instead offered the position to Riehle, a white female. Bray sued under Title VII, claiming that she had been denied the promotion because of her race. The district court had granted summary judgment to Marriott, finding that Bray not had offered enough evidence to either (1) cast doubt on the reasons offered by Marriott for promoting Riehle over Bray ("Prong One"), or (2)allow the jury to infer that discrimination was likely a motivating cause of the promotion decision ("Prong Two"). Marriott explained that it selected Riehle because she was the best applicant for the position. Compared to Bray, Riehle's qualifications were clearly superior, including a higher objective rating, greater experience, and participation in more seminars and training sessions.

The panel majority found that the facts were sufficiently in dispute that the district court's decision to grant summary judgment for Marriott was improper. Judge Alito, in dissent, first made clear that he understood Bray to be challenging the district court's ruling only on Prong One. He explained (quoting Third Circuit case law) that Prong One "requires that plaintiff point to evidence from which a reasonable factfinder can 'disbelieve the employer's articulated reasons'" (rather than merely disagree with them). He then described in detail how Bray had failed to satisfy her burden under Prong One. In its preliminary report PFAW asserts that Alito's dissent "made clear that he would have imposed an almost impossible evidentiary burden on victims of employment discrimination," but that distortion has no basis in reality. In particular, PFAW appears not to understand that Judge Alito's departure from the majority related only to the plaintiff's evidentiary burden under Prong One – and only then involved a small, and nuanced, difference in interpretation of the Supreme Court's governing (and ambiguous) pronouncements regarding how this burden was to be met.

Nothing about Judge Alito's opinion for a unanimous court in *Hopp v. Pittsburgh*, 194 F.3d 434 (3d Cir. 1999), reveals any hostility to affirmative action programs. In that case, the city of Pittsburgh revised its procedures for hiring police officers. The new policy supplemented the city's traditional written test – which some feared would disadvantage African-American applicants – with an oral test. Several white police officers were deemed to have failed their oral tests and they sued, arguing that they were victims of race-based discrimination. After trial, the jury found in the white officers' favor, and the Third Circuit unanimously affirmed the verdict.

Hopp tells us nothing about Judge Alito's inclinations one way or the other with respect to affirmative action. Rather, the case involved the straightforward application of principles of antidiscrimination law that have been settled since the Supreme Court's ruling in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Hopp* was a run-of-the-mill case in which the plaintiffs presented their evidence that they had suffered discrimination, the city presented its evidence that discrimination was not the reason the white officers weren't hired, and the jury after weighing all available evidence decided in favor of the plaintiffs.

Some of the plaintiffs' evidence – which the jury found more persuasive than the city's evidence – included the following: (1) the city's prior written examination was not

biased and was a powerful predictor of job performance; (2) the city refused to explain why any of the plaintiffs failed the oral examination; (3) the city initially planned to fail 15% of the applicants who made it to the oral examination phase, but then raised that number to 35% in an attempt to hire fewer white applicants; (4) the city undercut 29 white applicants who passed all of their examinations, but did not undercut any similarly-situated African-American applicants; and (5) while the city failed many white applicants who performed well on the written examination, it failed very few African-Americans who performed poorly on the written examination.

Sensitivity to Age and Disability Discrimination

Given the enormous number of employment discrimination cases that come before the federal courts, it is unsurprising that any federal judge will have issued decisions ruling both for and against plaintiffs claiming age discrimination. Judge Alito's record is entirely typical. In *Showalter v. University of Pittsburgh Medical Center*, 190 F.3d 231 (1999), for example, he found in favor of the employee and reversed a grant of summary judgment for the Medical Center. Showalter had been terminated as part of a reduction-in-force ("RIF"), which the Medical Center claimed has been based on department seniority. The Magistrate Judge applied older Third Circuit law governing RIF cases and found that Showalter could not prove age discrimination because he could not show that Medical Center had retained an "unprotected worker." Judge Alito concluded his was the wrong legal standard. He looked to more recent non-RIF cases in which the employee had to show only that the employer had been replaced by someone "sufficiently younger," and he extended those precedents to apply to RIF cases. On that basis, Judge Alito found in favor of Showalter.

Judge Alito also reversed the lower court's determination that no reasonable factfinder could have rejected the Medical Center's proffered nondiscriminatory reason for terminating Showalter – that he had the least departmental seniority. Judge Alito carefully reviewed the record evidence and found that the Medical Center did not automatically make RIF decisions based on *departmental* seniority; in some cases, they relied on seniority in a particular job or seniority at a particular hospital. According to Judge Alito, a reasonable factfinder could have concluded that the Medical Center chose to use departmental seniority so it could discriminate against Showalter. He therefore reversed the lower court's decision and allowed Showalter to continue his action against the Medical Center.

Of course, Judge Alito's careful evaluations of legal standards and record evidence mean little to the far Left, which seems to believe that employees should win every case of employment discrimination they bring. Thus, PFAW complains about Judge Alito's decision in *Bhaya v. Westinghouse Electric Corporation*, 922 F.2d 184 (1990). Judge Alito wrote for a panel majority that rejected the plaintiffs' technical evidentiary challenges to a district court's decision against them. As any appellate lawyer knows, such evidentiary challenges rarely succeed because the trial court is entitled to significant deference on factual and evidentiary issues. Indeed, the panel majority concluded that most of the plaintiffs' claims "clearly lack[ed] merit."

PFAW also distorts Judge Alito's record in its criticism of the majority opinion in *Grant v. Shalala*, 989 F.2d 1332 (3d Cir. 1993). In that case, the Third Circuit ruled that the district court lacked authority to conduct its own factfinding to determine whether an administrative law judge (ALJ) was biased, and that the district court's role was limited to reviewing the agency's findings on the issue. Judge Alito's opinion, emphasizing the importance of safeguarding the impartiality of agency adjudications, found that the statutorily-mandated course for a claimant wishing to challenge an ALJ's impartiality was to pursue first disqualification of the ALJ, then administrative appeal, and finally judicial review. PFAW's criticisms make plain that its real complaint against Judge Alito is that, in the process of faithfully applying governing law and requiring adherence to process, he does not invariably reach PFAW's preferred result.

Criticism of *Keller v. Orix Credit Alliance*, 130 F.3d 1101 (3d Cir. 1997) (en banc), is even more unfounded. In that case, Keller sued his former employer for age discrimination, when he had been discharged following his complete failure to even come close to raising capital that was essential to the business. Although Keller claimed he was discriminated against on account of his age, his employer replaced him with someone who was not even five years younger than Keller. Judge Alito's decision for the en banc Third Circuit was joined by eight of his eleven colleagues – including an appointee of President Carter and an appointee of President Clinton.

Another supposed example Judge Alito's insensitivity to the elderly and disabled is his decision in *McArdle v. Tronetti*, 961 F.2d 1083 (3d Cir. 1992). Judge Alito receives complaints from the Left for requiring the discrimination claim in that case be pled with specificity, even though a later (and entirely unrelated) Supreme Court case held that such specificity was not required. The requirement that certain discrimination claims be pled with specificity was the law of the Third Circuit, settled by a precedent that pre-dated Judge Alito's tenure on the bench. *See Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3d Cir. 1988). Thus, Judge Alito did nothing more than correctly apply the mandatory precedents of the Third Circuit. Not only was Judge Alito following the binding precedents of the Third Circuit, but the Third Circuit was not the only court at the time that required a heightened pleading standard for such claims. The Supreme Court recognized this fact in a later case, when it resolved the circuit split over the specificity with which discrimination claims must be pled. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165 (1993) (citing cases on both sides of circuit split).

This same evenhandedness is also on display in Judge Alito's disability-discrimination cases, many of which have been decided in favor of disabled plaintiffs. For example, in *Polini v. Lucent Technologies*, 100 Fed. Appx. 112 (3d Cir. 2004), Judge Alito held in favor of a plaintiff whose former employer refused to rehire her, purportedly because her eyesight was so poor that it made it impossible for her to resume her former position as a detailer. Judge Alito ruled that the plaintiff had introduced enough evidence that her case should have been allowed to go before a jury, rather than being disposed of by summary judgment. In another recent opinion, *Shapiro v. Township of Lakewood*, 292

F.3d 356 (3d Cir. 2002), Judge Alito reversed the district court's grant of summary judgment against a disabled employee simply because the employee had not complied with the employer's policy regarding transfer applications. Judge Alito returned the case to the district court with instructions to allow the employee, consistent with governing Supreme Court precedent, the opportunity to demonstrate that the employer could have provided reasonable accommodation of his disability.

Left-wing groups also criticize three other opinions by Judge Alito that did not come out fully in favor of the disabled plaintiffs. For example, *Caruso v. Blockbuster-Sony Music Entertainment Center*, 193 F.3d 730 (3d Cir. 1999), required the court to interpret two Justice Department regulations as they pertained to wheelchair-user sight lines and access to certain recreational facilities. Writing for a unanimous panel, Judge Alito ruled *in favor* of the disabled litigants on one of the two questions. Specifically, he reversed the district court's ruling that the defendant need not make the lawn area of a concert venue wheelchair-accessible given that there were numerous closer (and thus "better") seats that were wheelchair accessible. Judge Alito wrote that such a justification is "repugnant to the [Americans with Disabilities Act]" and "treats the ADA's requirement of equal access for people with disabilities as a 'particular technical and scoping requirement.' This is simply not the case. Rather, equal access is an explicit requirement of both the statute itself and the general provisions of the DOJ's regulations." On the other question, Judge Alito engaged in an in-depth analysis of the relevant rule's ambiguous history and meaning before concluding that it required the provision of dispersed wheelchair locations offering a variety of sight lines comparable to the variety of sight lines available to the general public. This ultimately was a *broader* reading than the alternate interpretation urged by the disabled appellants – namely, a requirement that such venues provide sight lines over standing spectators if such sight lines were available to the general public.

Equally baffling are objections to two other disability-related opinions. In one, *Ford v. Schering-Plough Corp*., 145 F.3d 601 (3d Cir. 1998), Judge Alito concurred with the majority's conclusion that the plaintiff had failed to state a claim because the ADA does not prohibit bona fide insurance plans from providing different coverage for different disabilities. He parted company with the majority merely because he believed that this conclusion – that the plaintiff had failed to state a claim – was all that was necessary to dispose of the case and that the majority unnecessarily reached the remaining issues. In another partial concurrence/partial dissent in *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368 (3d Cir. 1991), Judge Alito simply took the position, based on a factual record very damaging to the plaintiff, that a student who had left medical school a week into classes had not given the school ample notice of her need for special disability-related accommodations.

Fair-Minded in Other Labor and Employment Cases

Some on the Left have asserted that Judge Alito's record in cases concerning "worker protection" is somehow "mixed." Yet the two cases cited for that proposition demonstrate quite the opposite – that Judge Alito is both fair and well within the

mainstream. In *Bolden v. Southeastern Pennsylvania Transportation Authority*, 953 F.2d 807 (3d Cir. 1991) (en banc), Judge Alito wrote for an overwhelming 7-3 majority of the judges on the Third Circuit. Far from granting the employer a free pass, he rejected most of its arguments. But he found that where a union had agreed that employees would participate in drug tests, a worker's failure to take the union-approved test was grounds for discharge. And in *Mitchum v. Hurt*, 73 F.3d 30 (3d Cir. 1995), Judge Alito issued an unabashedly pro-worker opinion that allowed federal employees to bring claims in federal court even when they had not pursued remedies before an administrative agency. He went further than most federal appeals courts in holding that workers could seek equitable remedies such as reinstatement.

A Commitment to Religious Liberty

In case after case, Judge Alito has given effect to the First Amendment's guarantees of religious liberty. He has struck down a host of regulations that impose unique burdens or outright restrictions on those who wish to express their religious views, and he has shown special sensitivity to the rights of religious minorities. Judge Alito also has refused to sanction the efforts of radical secularists to purge the public square of all references to religion. Even PFAW has conceded, as it must, that Judge Alito "defend[s] the asserted rights of individuals to freely exercise their faith."

Time and again, Judge Alito has resisted government efforts to discriminate against people of faith. In *Child Evangelism Fellowship v. Stafford Township School District*, 386 F.3d 514 (3d Cir. 2004), he invalidated a school policy that allowed various student groups to distribute informational materials, but that barred a religious organization from doing the same. According to the court, "Stafford disfavored Child Evangelism because of the particular religious views that Child Evangelism espouses." In fact, during the proceedings, the school "sought to elicit Child Evangelism's admission that it adheres to a variety of traditional Christian doctrines"; the school's lawyer described those doctrines as "inconsistent with what we're obligated to teach, that being diversity and tolerance." Judge Alito thus saw the school's rule for what it was: a classic case of viewpoint discrimination.

Another example of Judge Alito's commitment to the First Amendment is *C.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000) (en banc). There, the majority upheld a school's decision to remove a student's religious poster from a Thanksgiving holiday display, and to bar the student from reading a religious-themed story to his class. (Other students were permitted to display secular posters and to read secular stories.) Judge Alito dissented, arguing that "public school students have the right to express religious views in class discussion or in assigned work." In particular, "the poster was allegedly given discriminatory treatment because of the viewpoint that it expressed, because it expressed thanks for Jesus, rather than for some secular thing. This was quintessential viewpoint discrimination, and it was proscribed by the First Amendment."

Judge Alito properly recognizes that the First Amendment's guarantee of religious liberty is not just for Christians. Rather, the constitutional right to worship according to

the dictates of one's conscience is the birthright of every American, regardless of faith. In *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), Judge Alito struck down a state law that required keepers of wild animals to obtain a permit, and that contained no exemption for those who sought to keep such animals for religious purposes. The plaintiff was a Native American who wanted to keep wild bears, which his faith regards as sacred. Similarly, in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), Judge Alito invalidated a rule that required police officers to shave their beards, and that contained no religious exemption. The plaintiffs were Sunni Muslims who believed they had a religious duty to grow beards.

Despite Judge Alito's record of protecting religious liberty, the Left will always find something to complain about. For example, in their preliminary report on Judge Alito People of the American Way fire off a broadside against Judge Alito's ruling in *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999). In that case, Judge Alito held that a city was permitted to erect a holiday display that included traditional representations of Christmas along with secular figures and symbols of other religions. The city's holiday display included "not only a crèche, a menorah, and Christmas tree, but also large plastic figures of Santa Claus and Frosty the Snowman, a red sled, and Kwanzaa symbols." According to Judge Alito, the Constitution did not require the religious symbols to be excluded from this eclectic display. Instead, the city was allowed to display religious representations on the same terms that it displayed other types of symbols.

Judge Alito's ruling was a straightforward application of the Supreme Court's holding in *Lynch v. Donnelly*, 465 U.S. 668 (1984), which upheld a virtually identical holiday display. There, a city was allowed to display "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads 'SEASONS GREETINGS,' and [a] crèche." Indeed, the display in *Schundler* was even more diverse and inclusive than the one approved in *Lynch*.

That *Schundler* was a simple application of settled precedent may explain why the ruling drew support from judges across the political spectrum. Judge Alito's opinion was joined by Judge Marjorie Rendell – an appointee of President Clinton and the wife of Ed Rendell, the former chairman of the Democratic National Committee and current Democratic Governor of Pennsylvania.

The Left's effort to cast aspersions on *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002), fares no better. In that case, Judge Alito upheld the decision of New Jersey prison officials to classify inmates who were members of the Five Percent Nation, or "FPN," as security threats. FPN is a notoriously violent group. It has ties to John Allen Muhammad and John Lee Malvo, the "Beltway Snipers" who murdered a number of innocent people in the Washington, D.C. area. FPN members attacked Hispanic inmates in New York prisons so viciously that the Hispanic inmates formed their own gang, the Latin Kings, to protect themselves. The FPN is the largest group in New Jersey's state prison system and since 1990 had a documented history of not only planning violent attacks in prison, but

also using FPN literature to carry coded messages to execute those attacks. Numerous courts have noted FPN's violence, including state and federal courts in New Jersey, New York, and Pennsylvania, as well as the U.S. Court of Appeals for the Fourth Circuit. No wonder, according to the record before the court in *Fraise*, "[m]any in the law enforcement community consider the Five Percent Nation to be 'one of the greatest threats to the social fabric' of the prisons." In addition to the FPN, other groups designated as security threats include violent gangs such as the Aryan Brotherhood, the Latin Kings, Neta, and the Prison Bikers Brotherhood.

Judge Alito's opinion demonstrates that it was because of this history of violence – not because of any religious views – that PFN prisoners were designated as security threats. In so ruling, Judge Alito faithfully applied governing Supreme Court caselaw indicating that prison officials must be shown great deference in managing their violent and unpredictable inmate populations. According to the High Court, running a prison is "peculiarly within the province of the legislative and executive branches of government," and "separation of powers concerns counsel a policy of judicial restraint." *Turner v. Safley*, 482 U.S. 78 (1987). Moreover, New Jersey's policy allowed FPN members to practice their religious beliefs generally, although certain risky practices were not permitted. This is nothing more than a straightforward application of prior Third Circuit precedent, which instructs that, in prison free-exercise cases, the question is whether the inmate has "alternative means of practicing his or her religion generally, not whether [the] inmate has alternative means of engaging in [any] particular practice." *DeHart v. Horn*, 227 F.3d 47, 55 (3d Cir. 2000). Far from betraying any indifference to the rights of religious expression – a dubious proposition in light of the strong record recounted above – *Fraise* actually demonstrates Judge Alito's dedication to stare decisis and the importance of adhering to settled precedent.

Protecting Freedom of Speech

On free speech the far left sounds the alarm because Judge "Alito's opinions suggest that he believes that student speech about morality and 'sin' should not be restricted even when it may offend others." But protecting the right to speech even when others may disagree or be offended is *precisely* what the First Amendment is all about. Even a cursory review of Judge Alito's opinions on the First Amendment shows that they are thoughtful, scholarly, and reasonable.

In *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001), writing for a *unanimous* panel that included Judge Rendell – the wife of Pennsylvania's Democratic Governor Ed Rendell, the former head of the DNC – Judge Alito struck down a school policy that prohibited students from expressing their religious beliefs on the morality of homosexual conduct. In other words, the policy permitted the expression of viewpoints that supported homosexual conduct, but not those that opposed it. Such viewpoint discrimination is *exactly* what the First Amendment prohibits. No wonder the opinion was lauded by the *Pittsburgh Post-Gazette*, which no one would mistake for a hotbed of conservatism. And no wonder the opinion is viewed with suspicion by liberal special interest groups, which wants the courts to support its ultra-liberal agenda,

including gay marriage, late-term abortion-on-demand, and the banning of religious viewpoints from public debate.

In *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994), Judge Alito joined the opinion of universally respected jurist Judge Becker, to hold that a state law restricting political speech was unconstitutional. Political speech is at the heart of the First Amendment's protections – precisely what the Founders were most concerned about. PFAW's complaint is not with the decision, but with what it dubs the "unorthodox move" of fashioning a test to determine what restrictions the state could place on roadside political campaign signs in the absence of binding Supreme Court precedent. PFAW takes issue with the fact that Judge Becker's opinion did not follow a decision of four justices on the Supreme Court. But four is not a majority. Indeed, the Supreme Court itself has precedent on when a plurality opinion is controlling and when it is not. *See Marks v. United States*, 430 U.S. 188 (1977); *Nichols v. United States*, 511 U.S. 738, 745-46 (1994). Judge Becker was not alone in concluding that there was no binding Supreme Court precedent to apply. The Sixth Circuit unanimously reached the same conclusion in *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 470 n.9 (6th Cir. 1991), as did the Eleventh Circuit just recently in *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1261 n.10 (11th Cir. 2005). PFAW is once again desperately crying wolf.

In *Sanguigni v. Pittsburgh Board of Public Education*, 968 F.2d 393 (3d Cir. 1992), writing for a unanimous panel of the Third Circuit, Judge Alito considered whether an employee could be terminated for "statements . . . intended to gather opposition to the school administration." Applying binding Supreme Court precedent, it concluded that the employee's termination was consistent with the First Amendment. No other court of appeals or the Supreme Court has ever questioned Judge Alito's scholarly and detailed opinion.

And in *Banks v. Beard*, 399 F.3d 134 (3d Cir. 2005), *certiorari granted:* 2005 U.S. LEXIS 8383 (U.S. Nov. 14, 2005) Judge Alito dissented from an opinion that found prison inmates had a First Amendment right to newspapers and magazines in their cells. Only the far Left could think prisoners were entitled to newspapers and trashy magazines. Felons lose rights when they are convicted – that's why they are prisoners. In his thoughtful dissent, Judge Alito patiently explained that the majority had misapplied the Supreme Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987), a standard that instructs courts to extend considerable deference to judgments of correctional officials. The majority overturned the judgment of the duly elected officials of Pennsylvania – not exactly a "red" state – and imposed their own judgment about how best to run the prison. Judge Alito thus rightly dissented.

Judge Alito's record on the First Amendment and the protection of freedom of speech is simply impeccable. Any suggestion to the contrary is, well, out of the mainstream.

Faithfully Applying the Law to Prisoner Litigation

Judge Alito in a number of cases has safeguarded the rights of prisoners – particularly inmates who claim that their convictions were tainted by racial discrimination. For example, in *Brinson v. Vaughn*, 398 F.3d 225 (3d Cir. 2005), Judge Alito reversed the district court's dismissal of an African-American inmate's habeas corpus petition; the inmate was challenging the state prosecutor's decision to strike a number of African-Americans from the jury. Judge Alito ruled that the inmate had made out a prima facie case of a constitutional violation and that, although the inmate's petition was filed late, it was proper to toll the statute of limitations. Similarly, in *Williams v. Price*, 343 F.3d 223 (3d Cir. 2003), Judge Alito granted a writ of habeas corpus to an African-American inmate after a witness stated that a juror had uttered derogatory remarks about African-Americans during an encounter in the courthouse following the trial.

Nothing about Judge Alito's ruling in *Poole v. Family Court of New Castle County*, 368 F.3d 263 (3d Cir. 2004), decided unanimously by a bipartisan panel, reasonably can be read as evincing a lack of sympathy to prisoner litigants. That case presented an arcane question involving the Federal Rules of Civil Procedure – the sort of issue only a lawyer could love.

The *Poole* case arose when an inmate sued numerous parties, including prison officials, claiming that they were limiting his access to a minor he represented to be his son. The district court dismissed all of Poole's claims, in part because it found them to be frivolous. However, Poole did not immediately receive notice that his lawsuit was dismissed. He was being transferred to a different prison at the time and the district court clerk, who did not know about the transfer, sent the notice to the original prison address. After receiving notice, the prisoner sought to appeal.

Writing for a unanimous Third Circuit panel, Judge Alito held that the prisoner had not filed his appeal within the time allotted by the rules. This outcome flowed inexorably from the text of Federal Rule of Civil Procedure 77(d), which instructs that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve or authorize the court to relieve a party for failure to appeal within the time allowed," and Federal Rule of Appellate Procedure 4(a)(6), which required Poole to move to reopen the time to file an appeal within seven days of receiving notice. As sympathetic as Judge Alito and his colleagues might have been to the prisoner's situation, the court was bound by the rules, and could not have reached any other result without ignoring the governing law. Judge Alito's opinion thus stands as a further testament to his commitment to faithfully applying statutory text, no matter how personally distasteful he may find the outcome.

It cannot be overemphasized that the *Poole* case was decided unanimously, by a bipartisan panel of judges. One of the judges who joined Judge Alito was appointed by President Carter, and the other judge had served as Acting Solicitor General in the Carter Administration. With that in mind it is hard to see how this case could possibly be an example of Judge Alito being "outside of the mainstream."

Criticisms of Judge Alito's decision in *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004), seem to come from the fact that there are those who overlook the fact that some cases present hard questions, and that judges operating in good faith can come to different conclusions about what the law requires. In *Rompilla*, a convicted murderer filed suit alleging that he had been convicted because his lawyer had not adequately represented him. The prisoner's trial attorneys decided not to search his school, medical, court and prison records for any mitigating factors that would counsel against imposing the death penalty. Instead, they believed that the best way to find such evidence was to interview several family members and health experts. None of these witnesses mentioned the prisoner's childhood neglect, mental problems, or any other facts that might have helped his case.

It is crucial to a fair-minded understanding of the matter to recognize that ineffective assistance of counsel cases are, by their very nature, extremely fact intensive. In fact, after Judge Alito in a 2-1 opinion held against the prisoner, the full Third Circuit by a 6-5 vote decided not to rehear the case – thereby effectively affirming Judge Alito's ruling. Even the district court, which ruled in favor of the prisoner, acknowledged that it was a close call "because trial counsel performed so admirably according to my review of the record. . . . [T]rial counsel were intelligent, diligent, and devoted to their task of representing [Rompilla]." The fact that the *en banc* Third Circuit agreed with his analysis in a 6-5 vote and the Supreme Court disagreed in a 5-4 vote indicates that the district court got it right in describing the case as "a close call."

Nor was the Third Circuit the only court to follow the course charted in *Rompilla*. Rather, Judge Alito's ruling that the prisoner's trial representation was not so deficient as to offend the Sixth Amendment was consistent with rulings from a number of other circuits. One court held that "the test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is . . . whether what [counsel] did was within the 'wide range of reasonable professional assistance.'" *Waters v. Thomas*, 46 F.3d 1506, 1518 (11th Cir. 1995) (en banc) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Another held that a defendant is not entitled "to the best available counsel or the most prudent strategies"; instead, the Sixth Amendment is "satisfied when the lawyer chooses a professionally competent strategy that secures for the accused the benefit of an adversarial trial." *Kokoralies v. Gilmore*, 131 F.3d 692, 696 (7th Cir. 1997).

Finally, some of the Left, such as PFAW, have criticized Judge Alito over his decision in *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir. 1994), in which a unanimous Third Circuit panel upheld on habeas corpus review a state court conviction for drug offenses and theft. Writing for the court, Judge Alito rejected the convict's argument that it was unconstitutional for the prosecutor to dismiss five Spanish-speaking jurors because the translation of taped conversations in Spanish was expected to be hotly contested at trial. His critics neglect to mention that the outcome was dictated both by the deferential standard of review required by Congress in habeas cases, as well as by the Supreme

Court's own precedent in *Hernandez v. New York*, 500 U.S. 352 (1991). Moreover, the Ninth Circuit – hardly known as a bastion of conservatism – later followed the same reasoning regarding bilingual jurors, noting that "[w]hen, as here, a district court is faced with a jury that includes one or more bilingual jurors and the taped conversations are in a language other than English, restrictions on the jurors who are conversant with the foreign tongue is not only appropriate, it [sic] may in fact be essential. . . . The rules of evidence and the expert testimony would prove of little use if a self-styled expert in the deliberations were free to give his or her opinion on this crucial issue, unknown to the parties." *United States v. Fuentes-Montijo*, 68 F.3d 352, 355 (9th Cir. 1995).

Faithful Enforcement of Immigration Laws

Judge Alito's numerous immigration decisions defy classification as either "liberal" or "conservative," but instead reflect his usual commitment to applying the law to the case at hand impartially. For example, in *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1998), which is also discussed above, Judge Alito gave the term "refugee" in the Immigration and Nationality Act a broad reading. The petitioner in that case, a female citizen of Iran who fled the country just before the fall of the Shah and entered the United States as a nonimmigrant student, sought asylum because "she would be persecuted in Iran simply because she is a woman." Judge Alito held that she was eligible for asylum if she could show that compliance with Iran's "gender specific laws and repressive social norms" (such as the requirement that women wear veils in public) would be deeply abhorrent to her.

Judge Alito has recognized that asylum cases are "among the most difficult" confronting the federal courts, and that "[m]uch is obviously at stake" in those cases. Part of the difficulty, as scholars have noted, is that "[a]sylum determinations often depend critically on a determination of the credibility of the applicant, for she will usually be the only available witness to the critical adjudicative facts of the case."[8] Congress requires federal judges to defer to the credibility assessments of Immigration Judges (IJs) who hear testimony in the first instance, "unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). As Judge Alito has noted, the highly deferential standard Congress has chosen "puts us in the uncomfortable position of deferring to a credibility determination about which we are skeptical. But the statute leaves us no alternative."

Still, Judge Alito has been willing to reject an IJ's credibility determination in appropriate cases. In *Gui Cun Liu v. Ashcroft*, 372 F.3d 529 (3d Cir. 2004), the IJ improperly rejected a married couple's documentary evidence of the forced abortions the wife had suffered in China, even though the abortion certificates corroborated their account of the persecution they had suffered. The IJ had given no weight to the abortion certificates because they had not been authenticated in accordance with regulations, even though the couple had attempted to authenticate them and had been told by the Chinese

[8] David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1281-82 (1990) (footnotes omitted).

government that it was impossible to do so. Judge Alito held that they "should have been allowed to attempt to prove the authenticity of the abortion certificates through other means, especially where (as here) attempts to abide by the requirements of [the regulations] failed due to lack of cooperation from government officials in the country of alleged persecution." Because the corroborating evidence should have been considered, Judge Alito rejected the IJ's finding that the couple was not credible.

But that is not good enough for left-wing groups like PFAW, who seem to think that any illegal alien seeking asylum in the United States should be granted it. In their report on Judge Alito group complains about Judge Alito's dissent in *Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003) (en banc). In that case, an IJ had found an illegal alien's testimony incredible, in part because of substantial inconsistencies in his testimony and its general implausibility in certain particulars. Despite the statutory standard – which requires deference to the IJ "unless *any reasonable adjudicator* would be *compelled* to conclude to the contrary" – the majority rejected the IJ's findings simply because it was *possible* for one to reach a different conclusion. In effect, the majority stood the congressional standard on its head. Judge Alito – joined by one appointee of President Carter and another Republican appointee – dissented on the ground that the court was compelled by statute to defer to the IJ. Judge Alito noted that he might not have made the same credibility determinations as the IJ, but his responsibility was to apply the "reasonable adjudicator" standard that Congress had enacted.

Judge Alito dissented in *Chang v. INS*, 119 F.3d 1055 (1993), for similar reasons. In that case, a Chinese engineer who led a delegation to the United States violated the Chinese Security Law because he did not report his suspicions that some of his colleagues were planning to defect; the engineer then remained in the United States and sought asylum because he feared prosecution for his legal violations. The IJ denied his request for asylum because the prosecution he might have faced in China was not politically motivated; in fact, the engineer never expressed any political disagreement with the Chinese government. Under the law as enacted by Congress, the IJ's determination was entitled to deference unless no reasonable fact finder could have reached the same conclusion. Although the panel majority refused to defer to the IJ's fact finding, Judge Alito followed the congressional directive and would have deferred, because the IJ's decision was at least reasonable in the absence of any testimony that the engineer was politically opposed to the government of China.

Judge Alito has also been criticized for his dissent in *Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004). The issue in that case was whether a conviction for filing a false tax return was an aggravated felony that made resident aliens subject to removal from the country. To Judge Alito, it was a straightforward matter of statutory interpretation: An aggravated felony was generally defined by Congress as an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." Because the offense at issue – filing a false tax return – involved fraud or deceit, he concluded that it met the statutory definition of an aggravated felony.

Judge Alito does not reflexively conclude, however, that any felony is the sort of offense that makes an alien subject to removal. For example, in *Oyebanji v. Gonzalez*, 418 F.3d 260 (3d Cir. 2005), a resident alien had been ordered removed for committing a "crime of violence" after he was convicted of vehicular homicide. The Supreme Court had already decided in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) that crimes involving only a showing of negligence did not qualify as "crimes of violence," but the Supreme Court specifically left open the question of whether crimes requiring only a showing of recklessness were "crimes of violence." Judge Alito held that they were not, thereby sparing the alien from removal under the immigration laws.

The Vanguard Recusal: An Absolute Non-Issue

Unfortunately for the left-wing special interests groups, their gross misrepresentations of Judge Alito's record have failed to make any headway with the public. It was clear from the very beginning of this process that Judge Alito is one of the most experienced and qualified persons ever to be nominated to the Supreme Court. With recent polls showing that the American people support Judge Alito's confirmation by a 2-1 majority[9], the Left is now scraping the bottom of the barrel in an attempt to smear Judge Alito. Specifically, they have attempted to raise a conflict of interest issue concerning recusal in a case involving Vanguard Funds, which held some of Judge Alito's assets. *See Monga v. Ottenberg*, 43 Fed. Appx. 523 (2002). A brief review of the facts of the case and a clear reading of the federal ethics statutes, however, reveals that Judge Alito violated none of his ethical responsibilities.

In the case at issue, a bankrupt plaintiff accused Vanguard of improperly disbursing the proceeds of her account, which, pursuant to a Massachusetts court order, Vanguard made available to the plaintiff's creditors. Therefore, Vanguard had no direct interest in the case and was only a third party that was holding the funds either for the bankrupt plaintiff or her creditors By the time the case reached the Third Circuit, the case was not even about the Vanguard disbursement itself. Rather, it was about the effect of the court order.

In the opinion of three independent legal experts[10] Judge Alito's initial participation in the appeal was not improper under 26 U.S.C. §455, the federal ethics statute which established the governing rules. Judge Alito did not own stock in Vanguard. Instead, he was a fund investor and, therefore, more like a depositor in a bank with no ownership interest or control over disbursements. Moreover, according to one expert, even if he had owned stock, "the amount involved in the plaintiff's dispute with Vanguard was not enough in my opinion to create an 'appearance of impropriety.'"[11]

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[9] Lydia Saad, *Americans Generally Favor Alito Appointment: Closer to Roberts than to Miers in popularity*, The Gallup Poll (November 14, 2005)

[10] Geoffrey C. Hazard, Jr., Trustee Professor of Law, University of Pennsylvania; Thomas D. Morgan, Oppenheim Professor of Antitrust & Trade Regulation Law, George Washington University School of Law; Ronald D. Rotunda, Professor of Law, George Mason University School of Law

[11] Letter from Geoffrey C. Hazard, Jr., Trustee Professor of Law, University of Pennsylvania to Arlen Specter, United States Senate (November 3, 2005)(available at: http://www.gop.com/news/hazard.pdf)

Finally, Vanguard had no financial stake in the dispute and therefore could not be harmed or benefited by the outcome of the case. Either way, Vanguard was going to distribute the money to one of the parties.

When he first ascended to the Third Circuit Court of Appeals Judge Alito properly listed Vanguard funds among his assets, but the court's computer program, which was supposed to automatically keep judges from sitting on cases involving parties they have listed, had a glitch. It was this program which randomly, but mistakenly, assigned the case to Judge Alito and two other judges.

The outcome of the case was clear whether Judge Alito participated or not. When the case was initially reviewed by the Third Circuit, Judge Alito was part of a unanimous three-judge panel affirming the district court's decision. After a complaint by the plaintiff made Judge Alito aware of the possible conflict, he immediately informed Third Circuit Chief Judge Edward Roy Becker, so that a new panel could review the decision. He did this despite the fact that he was not required to do so by the canons of judicial ethics. The second panel, like the first, unanimously rejected the plaintiff's claims. Clearly, the plaintiff's complaint against Judge Alito was little more than an attempt to keep alive a lawsuit that had no merit.

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