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PRESIDENT
NAN ARON
CHAIR
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January 11, 2006

The Honorable Arlen Specter
Chairman, Senate Judiciary Committee
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Dear Senators Specter and Leahy:

I write on behalf of Alliance for Justice to oppose the nomination of Third Circuit Judge Samuel A. Alito to the United States Supreme Court. As detailed in the attached executive summary to our full report on the Alito nomination, Judge Alito has quietly promoted a jurisprudence that aggrandizes executive authority at the expense of individual liberties, limits Congressional authority to enact legal safeguards, and generally diminishes judicial authority to enforce both statutory and constitutional rights. For further information, please see Alliance for Justice's full report on Judge Alito, which is available at http://www.supremecourtwatch.org/Alitofinal.pdf.

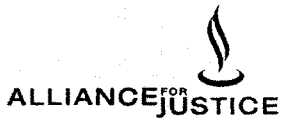
Alliance for Justice is a national association of more than 70 environmental, civil rights, mental health, women's, children's and consumer advocacy organizations. Alliance for Justice's Judicial Selection Project, founded in 1985, has taken a leading role in efforts to ensure a fair and independent federal judiciary. The Project monitors judicial nominations at all levels of the federal bench. The Project promotes support for the nomination and confirmation of highly capable and fair judges who have demonstrated a commitment to equal justice.

Sincerely,

Nan Aron
President

Attachment

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO



II. EXECUTIVE SUMMARY

On October 31, 2005, President Bush nominated Third Circuit Judge Samuel A. Alito to replace retiring Associate Justice Sandra Day O'Connor on the Supreme Court. Harriet Miers, the president's former nominee for Justice O'Connor's seat, had withdrawn from consideration several days before. The same political conservatives who opposed Ms. Miers' nomination as a squandered opportunity immediately embraced the nomination of Judge Alito. Having promoted him for several years in anticipation of a vacancy, they firmly believe, based on his long record, that he will realize their long-deferred hopes of moving the Court and the law dramatically to the right. University of South Carolina law professor Andrew Siegel recently explained why they are correct:

> When confronting [difficult cases like those the Supreme Court handles], judges are forced back – almost inexorably – to their own, often inchoate, ideas about human behavior, social policy, and the judicial role. For most Supreme Court nominees, we need to guess how these "priors" will shape their jurisprudence, but for Alito, we have a long and consistent answer: He will tack hard to the right. ... If you are a fan of the justices who fought throughout the Rehnquist years to pull the Supreme Court to the right, Alito is a home run – a strong consistent conservative with the skill to craft opinions that make radical results appear inevitable.[1]

The findings set forth in this report are consistent with Professor Siegel's observation, which is in turn consistent with how enthusiastically those who opposed Ms. Miers' nomination have received Judge Alito's. In split decisions – the "difficult cases" – the reasoning Judge Alito employs and the results he reaches are not balanced. Rather, to a remarkable degree, they track the staunchly conservative political and legal views he expressed in his 1985 application to be Deputy Assistant Attorney General for the Office of Legal Counsel in President Reagan's Justice Department. As previewed in the application, Judge Alito has quietly promoted a jurisprudence that aggrandizes executive authority at the expense of individual liberties, limits Congressional authority to enact legal safeguards, and generally diminishes judicial authority to enforce both statutory and constitutional rights. Our main findings are as follows:

- In split decisions involving individual rights, Judge Alito has been extraordinarily deferential to the exercise of government power, especially executive branch

[1] Andrew M. Siegel, *Nice Disguise; Alito's frightening geniality*, NEW REPUBLIC, Nov. 14, 2005.

power, except in cases involving alleged infringements on religious expression. Appendix A provides a breakdown of Judge Alito's votes in split decisions in cases pitting an individual against the government or government officials. As reflected in the chart, one can reliably predict his vote in split decisions involving misconduct or error by police, prosecutors, immigration authorities, prison staff, and school and land use officials simply by identifying the parties. Together with earlier speeches and writings, his judicial record strongly suggests that he will not only continue to look past the rights-infringing actions of such officials, but will interpret the Constitution as giving the president greater authority to evade Congressional statutes and constitutional limitations whenever deemed essential to national security.

- While staying his hand in most cases involving alleged misconduct or error by government officials, Judge Alito has indicated a strong belief in deploying judicial power to limit Congressional authority to address issues of national concern, including discrimination, pollution and crime.

- In split decisions on the merits of claims alleging violations of the civil rights of racial minorities, women, seniors and people with disabilities, Judge Alito has almost uniformly ruled with the defendants, often downplaying the importance of circumstantial evidence, including evidence that juries below him found persuasive.

- As Stephen Labaton of the *New York Times* reported, Judge Alito has "reliably favored big business litigants as he has pushed the federal appeals court in Philadelphia in a conservative direction. ... [He is] a jurist deeply skeptical of claims against large corporations."[2] This has proven true not only in split decisions involving the alleged violation of antidiscrimination, labor and environmental laws by corporate actors, but also in several split antitrust and trademark decisions where small businesses alleged that bigger corporations engaged in anti-competitive or unfair practices.

- Judge Alito has not hesitated to challenge circuit court precedents or to "massage" Supreme Court precedents that are inconsistent with his vision of the law.

- On occasion, Judge Alito appears to have adopted a demonstrably results-oriented approach to decision-making. In several cases involving claims disfavored by political conservatives – one for *habeas corpus* relief from a death penalty conviction, one alleging on-the-job same sex sexual harassment and one alleging injury due to a defective product – Judge Alito voted in dissent to deny relief by raising various procedural defenses on his own, without prompting by the defendants. Yet in a case involving a tricky constitutional question about whether

[2] Stephen Labaton, *Court Nominee Has Paper Trail Businesses Like*, N.Y. TIMES, Nov. 5, 2005.

> unidentified school employees violated a public school student's right to express religious views, he did not hesitate to rule in the student's favor on the merits while chastising his colleagues in the majority (10 of the other 11 judges) for finding the matter inadequately presented for adjudication.

While this report addresses unanimously decided cases, it focuses principally on the split decisions in which Judge Alito has participated. In those decisions, Judge Alito has frequently gone to the right of even his Republican-appointed colleagues to find against individuals claiming that government officials or corporations violated the law. To be sure, in the course of the thousands of decisions Judge Alito has authored or joined in 15 years, there are exceptions. But the exceptions arise almost always in cases decided by a unanimous court, where there is little or nothing to suggest that the law might have compelled a different result. In the split decisions, and overall, a pattern of ruling against individuals claiming that large institutions violated their rights is unmistakable.

Other analyses have reached the same conclusion. University of Chicago law professor Cass Sunstein examined Judge Alito's approximately 65 dissents on the theory that "when a judge bothers to dissent from a majority is a good clue to what the judge cares most about."[3] What Professor Sunstein found was "stunning. Ninety-one percent of Alito's dissents take positions more conservative than his colleagues on the appeals court, including colleagues appointed by Presidents Bush and Reagan. ... Alito's conservative dissent rate is far more lopsided than other very conservative judges."[4] Professor Sunstein explained that the dramatically conservative results Judge Alito reaches in "hard cases" favor large, "established institutions," like corporations, universities and the government.[5] Professor Sunstein has concluded that "there is a good chance that Alito will be with Justices Scalia and Thomas in their attempts to move Constitutional law in some respects to what it was a long time ago."[6]

Like Professor Sunstein, Adam Liptak and Jonathan D. Glater of the *New York Times* analyzed Judge Alito's dissents, concluding:

> [H]is dissents are almost always more conservative than the majority's ... He frequently voted in favor of government and corporations ... Academic studies of dissenting opinions generally predict that judges appointed by Republican presidents will dissent more often in cases in which both of the other judges on the three-judge panels were appointed by Democratic presidents. But Judge Alito does not follow that pattern:

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[3] Nina Totenberg, *A Survey Course on Samuel Alito's Legal Views*, MORNING ED, NAT'L PUB. RADIO, Nov. 11, 2005.
[4] *Id.*
[5] Cass Sunstein, *Alito's Deference to Established Institutions*, TNR ONLINE, by subscription at https://ssl.tnr.com/p/docsub.mhtml?i=w051031&s=sunstein110105 (Nov. 1, 2005).
[6] Jennifer Barrett, *A Pattern of Conservatism*, NEWSWEEK, Nov. 4, 2005, available at http://www.msnbc.msn.com/id/9880810/site/newsweek/ (last visited Jan. 3, 2006).

> he dissented in 4 cases in which both of the other judges were appointed by Democrats and in 26 in which they were both appointed by Republicans.[7]

Stephen Henderson and Howard Mintz of the news service Knight Ridder completed a broader survey, examining all 311 of the published opinions Judge Alito has authored. They concluded that he:

> has worked quietly but resolutely to weave a conservative legal agenda into the fabric of the nation's laws. ... Although Alito's opinions are rarely written with obvious ideology, he's seldom sided with a criminal defendant, a foreign national facing deportation, an employee alleging discrimination or consumers suing big business. ... [His] record reveals decisions so consistent that it appears results do matter to him. ... A review of Alito's work on dozens of cases that raised important social issues found that he rarely supports individual rights claims. ... Alito often goes out of his way to narrow the scope of individual rights, sometimes seeking to undo lower court rulings that affirmed those rights.[8]

The upshot of our analysis and these other analyses is that Judge Alito is not simply a judicial conservative. Rather, he is an outlier, "brimming with ideas for pushing the boundaries of existing doctrine to the right in a number of crucial, albeit low-profile areas, such as federal employment discrimination law, search and seizure laws, and the rules governing the susceptibility of public officials to lawsuits."[9] As National Public Radio legal affairs correspondent Nina Totenberg reported, "Conservatives see [Judge Alito's nomination] as their moment to seize the day, to turn legal doctrine dramatically in a different direction."[10] Indeed, many say that by choosing Judge Alito, President Bush has fulfilled a promise to name justices "in the mold" of Justices Thomas and Scalia, the two justices who have tried most determinedly to transform the law.[11] In fact, however, as pointed out in a *Slate* article by Center for American Progress Senior Vice

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[7] Adam Liptak & Jonathan D. Glater, *Alito's Dissents Show Deference to Lower Courts*, N.Y. TIMES, Nov. 3, 2005.

[8] Stephen Henderson and Howard Mintz, *Review of Cases Shows Alito to be Staunch Conservative*, KNIGHT RIDDER, Dec. 1, 2005.

[9] Andrew M. Siegel, *Nice Disguise; Alito's frightening geniality*, NEW REPUBLIC, Nov. 14, 2005.

[10] *Morning Edition: A Survey Course on Samuel Alito's Legal Views*, (NPR radio broadcast, Nov. 11, 2005) *available at* http://www.npr.org/templates/story/story.php?storyId=5008701.

[11] For example, Rick Scarborough, President of the Judeo-Christian Council for Constitutional Restoration said in response to the nomination of Judge Alito: "The president has fulfilled his campaign pledge to appoint Supreme Court justices in the Thomas/Scalia mold." *Judeo-Christian Council Welcomes Alito Nomination*, Oct. 31, 2005 at http://www.visionamerica.us/site/News2?abbr=saj_&page=NewsArticle&id=5150; and the American Center for Law and Justice issued a statement saying that "President Bush promised that he would nominate Justices in the mold of Justices Scalia and Thomas. In choosing Judge Alito for the high court, President Bush has done just that." *Nomination of Judge Samuel Alito to Supreme Court is "Wise" Choice as President Bush Fulfills Promise, at* http://www.aclj.org/news/Read.aspx?ID=1985 (Oct. 31, 2005).

President Robert Gordon, Judge Alito may be even more doctrinaire than Justice Scalia – and thus more like Justice Thomas. Whereas Justice Scalia sometimes has refused to tolerate overreaching by executive branch actors, including the police and the president, and recently has recognized limitations on curbing Congress's legislative authority under the Commerce Clause, Justice Thomas has not. Nor has Judge Alito.[12] As *Slate*'s Dahlia Lithwick concluded, Judge Alito "neatly joins the ranks of right-wing activists in the battle to limit the power of Congress and diminish the efficacy of the judiciary."[13]

CONSTITUTIONAL LAW

Civil Rights and Civil Liberties under the Fourth Amendment. The Fourth Amendment has gotten increased attention in the wake of revelations that President Bush ordered the warrantless wiretapping of American citizens for national security purposes. Judge Alito's record indicates that he does believe the Fourth Amendment provides meaningful protection against government intrusion. He provided an early glimpse into his views in a 1984 Justice Department memo, concluding that it was constitutional for a police officer to shoot and kill a visibly unarmed, fleeing fifteen-year-old thief simply to prevent escape. The Supreme Court rejected that position 6-3, with all nine Justices disagreeing with the suggestion, advanced by Judge Alito in the memo, that the shooting did not even constitute a "seizure" implicating the Fourth Amendment; much less reflect conduct violating it. Judge Alito's judicial record mirrors the position he took in the memo. In 14 split decisions involving the Fourth Amendment – seven in civil rights cases, seven in criminal cases – he has never taken a position more protective of Fourth Amendment rights than his colleagues. For instance:

- Dissenting from the majority opinion of now-Homeland Security Secretary and long-time federal prosecutor Michael Chertoff, he voted to uphold the strip-search of a mother and her 10-year-old daughter, even though neither was a criminal suspect or named in the search warrant.

- He voted in dissent to keep a jury from hearing whether a police supervisor unlawfully allowed his officers to handcuff, hold at gunpoint and search a woman and her teenage children who, by happenstance, walked up to visit the home of a family member in the midst of a raid.

- Three years later, trying to distinguish that precedent, he held that marshals could engage in similar conduct while effecting a civil eviction.

- He upheld the around-the-clock, warrantless electronic surveillance of a suspect's hotel room on the grounds that government agents said they knew to activate the equipment only when the law let them do so – i.e., when a cooperating witness,

[12] Robert Gordon, *Alito or Scalito?*, SLATE, *at* http://www.slate.com/id/219107 (Nov. 1, 2005).
[13] Dahlia Lithwick, *Trick and Treat*, SLATE, *at* http://www.slate.com/id/2129106/ (Oct. 31, 2005).

who had consented to the monitoring, was in the room. Calling the situation "Orwellian," the dissenting judge wrote: "I can not endorse my colleague's willingness to entrust the fundamental right of privacy to law enforcement's discretion."[14]

Congressional Authority to Pass Nationwide Protections. In his 1985 job application, Judge Alito stated that he "believes very strongly in ... federalism."[15] In the job that he landed after submitting the application, he urged President Reagan to veto a consumer protection law regulating odometer tampering, saying that it "violates the principles of federalism supported by this administration."[16] The veto message, which Judge Alito approved and transmitted to the White House, asserted that "[a]fter all, it is the states, and not the federal government, that are charged with protecting the health, safety and welfare of their citizens."[17]

As noted by George Washington University Professor Jeffrey Rosen, who supported the nomination of John Roberts, Judge Alito has carried these sentiments with him to the bench, showing himself to be "a conservative activist who [is] determined to use the courts to strike at the heart of the regulatory state ... [and whose] lack of deference to Congress is unsettling."[18]

- In *United States v. Rybar*,[19] Judge Alito wrote a dissent invalidating the federal law banning machine gun possession, saying it exceeded Congress' authority under the Commerce Clause, which is the constitutional underpinning for numerous worker, consumer, civil rights and public health and safety protections. His reasoning was not only rejected by his own colleagues – who accused him of disrespecting Congress by requiring it to "play Show and Tell with the federal courts"[20] – but had previously been rejected by each of the other five appeals courts that had considered the law in the wake of *United States v. Lopez*, the 1995 Supreme Court decision on which he relied. Every court to have looked at the machine gun law since then has similarly rejected Judge Alito's position, except one, and the Supreme Court vacated that ruling after finding earlier this year that Congress had the authority to proscribe the personal use of marijuana for medicinal purposes as part of a larger scheme to prohibit illicit drug trafficking.

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[14] *United States v. Lee*, 359 F.3d 194 (3d Cir.), *cert. denied*, 125 S.Ct. 408 (2004).
[15] Memorandum from Mark Sullivan, Associate Director, Presidential Personnel, to Mark Levin, Associate Deputy Attorney General, re: Samuel A. Alito, Jr., Deputy Assistant Attorney General, SES I (Dec. 12, 1985) (on file with Alliance for Justice).
[16] Memorandum from Samuel A. Alito, Jr., to Peter J. Wallison, Counsel to the President, re: Enrolled Bill S.475 (Oct. 27, 1986) (on file with Alliance for Justice).
[17] *Id.*
[18] Jeffrey Rosen, *How to Judge*, NEW REPUBLIC, Nov. 29, 2004, at 18.
[19] 103 F.3d 273 (3d Cir. 1996).
[20] *Id.* at 282.

- In *Chittister v. Department of Community and Economic Development*,[21] Judge Alito held that Congress does not have the authority to give the country's nearly five million state employees the right to sue their employers for damages for violating the Family and Medical Leave Act's guarantee of unpaid sick leave. Facing a similar challenge in *Nevada v. Hibbs*,[22] the Supreme Court later found that a state employee can enforce his or her rights under the part of the law requiring employers to provide for family leave. Chief Justice Rehnquist's majority opinion in *Hibbs* rejected one of Judge Alito's key arguments – i.e., that the FMLA is a "substantive entitlement program"[23] that exceeds Congress' constitutional authority to remedy a history of sex discrimination by state employers.

Executive Power. Judge Alito has dealt with one case involving conflicts between the executive branch and Congress, a question regarding whether the indictment of a member of Congress violated the Speech or Debate Clause of the Constitution. He has not dealt with cases involving questions such as whether the president can invoke what he says is his inherent constitutional authority to order warrantless domestic surveillance of American citizens in violation of the Foreign Intelligence Service Act. In speeches and memoranda, however, Judge Alito has indicated support for expanding executive authority vis-à-vis the other branches of government. He has embraced the "unitary executive" theory, which holds that congressionally-established independent agencies may not exercise discretionary executive power, even if Congress mandates that they remain free of presidential control. Consistent with this view, he has lauded Justice Scalia's lone dissent and criticized the majority's holding in a significant 1988 case, *Morrison v. Olson*,[24] which upheld the now-lapsed independent counsel law against the claim that it unlawfully enabled a judicially-appointed prosecutor, outside the control of the president, to bring charges against high-ranking government officials. As a Justice Department official, Judge Alito also argued that when signing legislation, the president should issue statements aimed at molding the meaning of often flexible statutory language, something usually believed to be within Congress' exclusive power (through the issuance of committee reports and the like). In another Justice Department memo, Judge Alito asserted that the Attorney General should enjoy absolute immunity from lawsuits claiming that he authorized the illegal, warrantless wiretapping of American citizens thought to present domestic threats to national security. Together with the extraordinary deference that Judge Alito has shown executive branch officials in cases involving civil liberties, criminal law, prisoners' rights and immigration, these disparate materials suggest that Judge Alito has been chosen because he favors "ever more

[21] 226 F.3d 223 (3d Cir. 2000).
[22] 538 U.S. 721 (2003).
[23] *Id.* at 734.
[24] 487 U.S. 654 (1988).

aggressive assertions of executive power uncheckable by either Congress or the judiciary," in the words of University of Texas law professor Sanford Levinson.[25]

Due Process Protections. The due process clauses of the Constitution protect against unwarranted and arbitrary government actions, particularly those intruding on intensely personal decisions like whom to marry, where to send one's children to school, and whether to use contraception. Like Justice Scalia, Judge Alito appears to embrace a conception of due process dictated exclusively by historical traditions, under which few if any rights not expressly enumerated in the Constitution would be recognized. Based on this narrow view, Judge Alito worked diligently to undo a line of Third Circuit due process precedents prohibiting arbitrary actions (including arbitrary land use decisions) resulting from the improper motives, bad faith or bias of government officials. He first argued that the precedents should be re-examined in 1995. Two years later, he issued a lone dissent from a 12-1 *en banc* decision making the same argument. Finally, in 2003, he convinced a judge from another court to join him – over a vigorous dissent by a Third Circuit Reagan appointee – in finding that an intervening Supreme Court ruling dictated the result he sought. Most other circuit courts continue to adhere to due process precedents similar to the one Judge Alito overturned. Overall, in nine of ten split decisions involving alleged due process violations, Judge Alito has ruled in favor of the government.

Reproductive Freedom. In his 1985 job application, Judge Alito referred to his work in the Reagan administration's Solicitor General's office by asserting that "it has been a source of personal satisfaction for me ... to help advance legal positions in which I personally believe very strongly. I am particularly proud of my contributions to recent cases in which the government has argued in the Supreme Court that ... the Constitution does not protect a right to an abortion."[26] The "contributions" to which Alito was referring were: (a) his assistance with the *amicus* brief in *Thornburgh v. American College of Obstetricians and Gynecologists*,[27] where the Reagan administration argued for overturning *Roe v. Wade*[28] and defended a number of abortion restrictions that the Supreme Court ultimately invalidated; and (b) a 17-page memorandum to the Solicitor General explaining how, beginning with *Thornburgh*, the Reagan administration could "advance the goals of bringing about the eventual overturning of *Roe v. Wade* and, in the meantime, of mitigating its effects."[29] As a judge, in the only case in which he participated that presented an open question on reproductive rights, Judge Alito voted in

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[25] Sandy Levinson, *Judge Alito and Executive Power*, BALKINIZATION, *at* http://balkin.blogspot.com/2005/12/judge-alito-and-executive-power.html (Dec. 29, 2005).
[26] Memorandum from Mark Sullivan, Associate Director, Presidential Personnel, to Mark Levin, Associate Deputy Attorney General, re: Samuel A. Alito, Jr., Deputy Assistant Attorney General, SES I (Dec. 12, 1985) (on file with Alliance for Justice).
[27] 476 U.S. 747 (1986).
[28] 410 U.S. 113 (1973).
[29] Memorandum from Samuel A. Alito, Assistant to the Solicitor General, to Charles Fried, Acting Solicitor General, re: *Thornburgh v. American College of Obstetricians and Gynecologists* (May 30, 1985) (on file with Alliance for Justice).

dissent to uphold a law requiring a woman, except in limited circumstances, to notify her husband before obtaining an abortion. The Supreme Court, including Justice O'Connor, rejected that view, saying that "women do not lose their constitutionally protected liberty when they marry."[30]

Religion. In his 1985 job application, Judge Alito said that one of the things that animated his interest in constitutional law was his "disagreement" with Warren Court decisions regarding "the Establishment Clause."[31] Greg Stohr at Bloomberg News has reported that, consistent with that view, Judge Alito's opinions have "lower[ed] the barrier between church and state," and that "like justices Antonin Scalia and Clarence Thomas," Judge Alito appears poised to "limit the scope of the constitutional ban on establishment of religion."[32] Judge Alito has found on several occasions that government conduct impermissibly discriminated against an individual's religious practices or beliefs. He has never found, however, that a government-sponsored practice violated the principle of church-state separation. In one case, decided *en banc*, Judge Alito joined a dissent arguing that a public school board could get around an earlier Supreme Court ruling that barred school-approved, clergy-led prayers at graduation ceremonies, by allowing students to approve student-led prayers. The Supreme Court rejected that dissenting view in a subsequent case. In another case, over a strong dissent criticizing Judge Alito for a "constitutional about-face ... [that] strikes to the core of the legitimacy of our jurisprudence,"[33] Judge Alito expressly disregarded language from a prior panel in the same matter to hold that the unconstitutionality of a religiously-motivated holiday display could be cured by the addition of a few secular symbols. A subsequent Supreme Court ruling, with Justice O'Connor casting the deciding vote, effectively disagreed.[34] In a third case, decided *en banc*, Judge Alito's dissent, joined by only one other judge, and chided the 10-member majority for remanding – on "a spurious procedural ground" – a claim that a student's drawing of Jesus had been removed from, then replaced to a less prominent location in, a school's hallway display.[35]

Freedom of Speech and Association. In split decisions, Judge Alito has shown less sympathy for First Amendment claims involving speech and association than for those involving religion. In one case, which the Supreme Court recently decided to review, he ruled that prison officials could bar certain inmates from having printed material, like newspapers and photographs, beyond legal mail and religious texts. In another case, he disagreed with five other circuits, held that a plurality opinion of the Supreme Court regarding restrictions on political campaign signage was not binding, and

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[30] *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992).
[31] Memorandum from Mark Sullivan, Associate Director, Presidential Personnel, to Mark Levin, Associate Deputy Attorney General, re: Samuel A. Alito, Jr., Deputy Assistant Attorney General, SES I (Dec. 12, 1985) (on file with Alliance for Justice).
[32] Greg Stohr, *Alito Would Likely be Religion's Best Friend on the Court*, BLOOMBERG NEWS, Dec. 21, 2005 *available at* http://www.bloomberg.com/apps/news?pid=10000103&sid=aUiUufH8pEPg&refer=us.
[33] *ACLU v. Schundler*, 168 F.3d 92, 114 (3d Cir. 1999) (Nygaard, J., dissenting).
[34] *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005).
[35] *C.H. v. Oliva*, 226 F.3d 198, 203 (3d Cir. 2000), *cert. denied*, 533 U.S. 915 (2001).

adopted a new standard upholding state and local regulations. In one split decision where he found a First Amendment violation, he issued an extraordinary order barring a civil conspiracy case from proceeding to trial, ruling that a trial on allegations that an asbestos manufacturer was conspiring with a trade association to conceal the dangers of asbestos and reduce the costs of asbestos cleanup placed too great a burden on the manufacturer's First Amendment right to associate with the trade organization. In unanimously decided cases, Judge Alito has ruled that the following restrictions violated the First Amendment's free speech and association guarantees: a school anti-harassment policy that would have forbidden evangelical Christians from speaking out against homosexuality, a ban on paid liquor advertisements in school newspapers, and prior-approval requirements for police officers who sought to offer expert testimony.

STATUTORY PROTECTIONS

Civil Rights. Judge Alito's record in split decisions in cases addressing the merits of claims brought under civil rights laws is stark. In 15 such decisions, he has sided with the defendant 13 times. His only votes for a plaintiff came in: (1) a 12-1 *en banc* decision in a case involving disability discrimination, where the sole dissenter took a position rejected by every other circuit to have examined the issue; and (2) an 8-4 *en banc* decision where he sided with a white teacher challenging a school district's affirmative action decision. Judge Alito has never voted in dissent to side with an employee on the merits of a discrimination claim and has dissented six times in favor of employers defending against such claims.

In split decisions, as noted by both commentators and his Third Circuit colleagues, Judge Alito "has tended to embrace narrow readings of important federal anti-discrimination laws."[36] He has argued in favor of throwing out jury verdicts favoring discrimination plaintiffs, keeping other cases from ever going to trial and excusing lower courts' erroneous exclusion of important evidence. In cases in which he and his colleagues disagreed, Judge Alito often tried to make it more difficult to prove claims of discrimination, especially those relying on circumstantial evidence, which is almost always the only kind of evidence available in civil rights cases. In one case, all 10 of his colleagues rejected Judge Alito's lone dissent, which would have nullified a jury verdict in favor of a worker claiming gender discrimination. In another case, the majority asserted that "Title VII would be eviscerated if our analysis were to end where [Judge Alito] suggests."[37] In a third case involving disability rights, the majority observed that "few if any Rehabilitation Act cases would survive summary judgment" were Judge Alito's approach to prevail.[38] And in a criminal case where Judge Alito ridiculed the salience of statistical evidence suggesting that the prosecutor's office had engaged in a pattern of excluding black jurors from murder trials, including the defendant's, the majority accused him of "minimiz[ing] the history of racial discrimination against

[36] Editorial, *Judge Alito on Civil Rights*, WASH. POST, Dec. 18, 2005.
[37] *Bray v. Marriot Hotels*, 110 F.3d 986, 993 (3d Cir. 1997).
[38] *Nathanson v. Med. College of Pa.*, 926 F2d 1368, 1387 (3d Cir. 1991).

prospective black jurors and black defendants."[39] Conservative legal scholar Bruce Fein, a colleague of Judge Alito's in the Reagan Justice Department, has acknowledged that Judge Alito's confirmation would shift the Supreme Court's civil rights jurisprudence to the right.[40]

Environmental Protections. Environmental organizations like the Sierra Club, Friends of the Earth and Earthjustice have opposed Judge Alito's nomination. Arguably the most important issues regarding environmental protections are whether Congress has the constitutional authority under the Commerce Clause to enact them and whether plaintiffs can get into court to enforce them. As to the first issue, in *United States v. Rybar* (mentioned above), Judge Alito articulated a limited – and now rejected – view of Congress' Commerce Clause authority which, if adopted, could weaken environmental safeguards, possibly including the wetlands protections whose legality the Supreme Court will address this term. As to the second issue, Judge Alito joined a 2-1 opinion making it harder than Congress intended for individuals to establish standing to sue under the Clean Water Act, voting to wipe out a $2.625 million fine against a company that violated its discharge permit 150 times. Three years later, the Supreme Court rejected Judge Alito's position by a 7-2 vote, with only Justices Scalia and Thomas dissenting. While Judge Alito has often voted to enforce environmental laws in straightforward, unanimously decided cases, in two split decisions he has rejected the government's enforcement efforts. In one, Judge Alito voted over dissent to reject specific measures the Environmental Protection Agency ordered a corporation to adopt to clean up an ammonia plume it had released into a large city's supply of drinking water.

Worker Protections. The AFL-CIO, the Change To Win federation, and several of their constituent unions have announced their opposition to Judge Alito. As noted in an AFL-CIO report, in unanimous, majority and dissenting workers' rights opinions that Judge Alito authored, he sided against workers in 16 of 20 cases. He has sided against workers in ten of sixteen split decisions in which he participated. In a dissent in *Reich v. Gateway Press, Inc.*,[41] he disagreed with the Department of Labor and argued for a narrow reading of the Fair Labor Standards Act that would have denied reporters the right to overtime wages. In another dissent in *RNS Services, Inc. v. Secretary of Labor*,[42] he also disagreed with the Department of Labor and would not have applied mine safety rules to an area of a defunct mine from which the company was still extracting materials to process into energy.

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[39] *Riley v. Taylor*, 277 F.3d 261, 292 (3d Cir. 2001).
[40] *See* Amy Goldstein and Jo Becker, *Critics See Ammunition in Alito's Rights Record*, WASH. POST, Nov. 3, 2005.
[41] 13 F.3d 685 (3d Cir. 1994).
[42] 115 F.3d 182 (3d Cir. 1997).

CRIMINAL LAW

In his 1985 job application, Judge Alito wrote that he developed an interest in constitutional law, in part, because of his disagreement with Warren Court decisions in the area of criminal procedure. Such decisions established, among others things, freedom from intrusion into private communications, an indigent defendant's right to counsel, *Miranda* warnings and the exclusionary rule. Judge Alito's 15-year record on the bench is remarkably consistent with what he wrote in his job application. He has participated in 45 split criminal law decisions. In 40 of the 45, he took a position more favorable to the government than at least one of his colleagues. Of the five split decisions where he favored the defendant's position more than the government's, two resulted in sentencing remands favored by 12-1 and 11-2 majorities; one involved civil forfeiture where the dissent would have affirmed two of four summary judgment rulings in favor of the government, rather than one of four, like Judge Alito; and one involved a question of appellate jurisdiction to review a mid-trial evidentiary ruling, decided 12-1. Only one, an unpublished decision, involved reversing a conviction. While Judge Alito dissented in the government's favor in 12 split decisions, he did not once vote in dissent in favor of a criminal defendant. In all five split decisions he participated in involving the death penalty, he ruled in favor of the government. Analyzing the death penalty rulings – two in dissent, a third overturned by the Supreme Court – U.C. Berkeley law professor Goodwin Liu observed "a troubling tendency to tolerate serious errors in capital proceedings."[43]

Throughout the split criminal law decisions in which he has participated, Judge Alito has excused or refused to recognize constitutional errors arising from the inadequate performance of defense counsel, the denial of counsel during police interrogations, racial discrimination in jury selection, prosecutorial misconduct, faulty jury instructions and improper searches and seizures. In contrast to his often narrow interpretations of constitutional and other statutory provisions, he has broadly interpreted criminal statutes to cover conduct that, in the eyes of his colleagues, Congress did not intend to criminalize. In split decisions involving the ineffective assistance of counsel and prosecutorial misconduct, Judge Alito has been castigated by his colleagues for trying to hollow out on-point Supreme Court precedent. In one of those cases, a death penalty case involving defense counsel's failure to investigate important evidence, the Supreme Court reversed him, relying on the very same precedent his dissenting Third Circuit colleague said he tried to elide. The Supreme Court has rejected Judge Alito's views favoring the government two other times – once regarding the interpretation of the Continuing Criminal Enterprise statute and once regarding whether a state could continue to incarcerate an individual after the state's supreme court later ruled, in a related case, that what the individual was convicted of was not actually a crime.

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[43] Goodwin Liu, *Life and Death and Samuel Alito*, L. A. TIMES, Nov. 27, 2005.

IMMIGRATION LAW

In immigration cases, Judge Alito has been extremely deferential to government authorities and immigration judges, despite what other "federal appeals court judges ... call a pattern of biased and incoherent decisions in asylum cases," according to the *New York Times*.[44] He participated in eight split decisions involving the merits of claims by asylum-seekers and individuals attempting to avoid deportation. He voted against individuals and for the government in seven of the eight cases. In five of these cases, he cast a dissenting vote, three of them from panels where both colleagues were also Republican appointees. In one case, the majority wrote that Judge Alito's view would "gut the statutory standard" and "ignore our precedent."[45] In another case, the majority felt that Judge Alito's interpretation of legislative intent was grounded in "speculation" that contradicted the "well-recognized rules of statutory construction."[46] In a third case, *Sandoval v. Reno*,[47] involving jurisdiction to hear a case rather than the case's merits, Judge Alito cast another dissenting vote in favor of the government, arguing that the Antiterrorism and Effective Death Penalty Act stripped federal courts of their authority to entertain certain *habeas corpus* claims made by undocumented immigrants facing deportation. The Supreme Court later rejected Judge Alito's view.

ACCESS TO COURTS

In split decisions, Judge Alito's record regarding whether litigants may bring suit, as opposed to whether they should prevail on the merits of the case, tilts in favor of defendants. In 16 of 24 cases, he has voted to deny aggrieved parties the right to bring suit. As described above, in one environmental ruling, later rejected 7-2 by the Supreme Court, Judge Alito found that environmental plaintiffs lacked standing to sue a company for repeated violations of the Clean Water Act. In another ruling also described above, and also rejected by the Supreme Court, Judge Alito held that a new law barred an immigrant from seeking relief from a deportation order in *habeas corpus* proceedings. Judge Alito also ruled, over a heated dissent, that an individual claiming that her disability benefits were denied due to the impermissible racial bias of an administrative law judge had no right to challenge the judge's bias in court. And in two cases where the government failed to deliver actual notice to a prisoner about property forfeiture proceedings against him, Judge Alito dissented – once alone against 10 others, once in a 10-2 ruling – to find that the government's efforts did not violate the prisoner's rights to challenge the forfeitures. In other split decisions, however, Judge Alito has ruled in favor of granting aggrieved parties access to the federal courts. In two cases alleging discrimination, for instance, he has ruled that statutes of limitations did not bar the plaintiffs from filing their cases. In one of those cases, the Supreme Court unanimously agreed with him.

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[44] Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005.
[45] *Dia v. Ashcroft*, 353 F.3d 228, 251 (3d Cir. 2003).
[46] *Lee v. Ashcroft*, 368 F.3d 218, 225 n.11 (3d Cir. 2004).
[47] 166 F.3d 225 (3d Cir.), *withdrawn by the court* (Nov. 20, 2000).

Perhaps most noteworthy about Judge Alito's record on access to courts is that he dissented in several cases to deny access on procedural grounds never advanced by the defendants, but also dissented from a 10-2 *en banc* decision to grant access to a boy who claimed that unidentified officials at his school discriminated against his religious views by removing, and then replacing in a less prominent position, his poster of Jesus on a bulletin board. Among the cases where he voted in dissent to deny access:

- In a death penalty case where two other Republican-appointed judges voted to reverse the conviction, Judge Alito would have sent the case back to the trial court to consider whether the claim warranting reversal was procedurally barred from consideration, even though the state never raised the procedural defenses at the district court or on appeal. The majority accused him of violating the principle of judicial restraint and of "com[ing] dangerously close to acting as [an] advocate for the state rather than as [an] impartial magistrate[]."[48]

- In a case where a worker claimed that a defective truck part caused a debilitating injury, Judge Alito again drew sharp criticism from two Republican appointees by finding that the worker had waived his objection to clearly inadmissible evidence, despite the defendant's failure to make that procedural argument.[49]

- In a third case involving a person with mental disabilities who claimed repeated sexual harassment by his co-workers, Judge Alito would have refused to hear the appeal because of sloppy brief writing, even though the trial court below had ruled on the specific claim at issue and the defendants responded to that specific claim on appeal. The majority asserted that it was compelled to rule because of "the fact that no prejudice would result to defendants by our entertaining appellate jurisdiction, that the briefs are adequate to present the critical issues, that the case potentially involves issues important in the administration of [job discrimination law], and that 'the error is so 'plain' that manifest injustice would otherwise result.'"[50]

[48] *Smith v. Horn*, 120 F.3d 400, 409 (3d Cir. 1997).
[49] *Dillinger v. Caterpillar, Inc*, 959 F.2d 430 (3d Cir. 1992).
[50] No. 99-2043, slip op. at 4 (3d Cir. Mar. 12, 2001).

Appendix A. Split Decisions in Cases Pitting Individuals Against the Government

Issue Area	On the Issue Dividing the Court, Judge Alito Sides with		On the Issue Dividing the Court, the Majority Sides with		Total
	Government	Individual	Government	Individual	
Access to Courts	8	5	6	7	13
Benefits	2	3	1	4	5
Civil Rights/Discrimination	5	1	5	1	6
Civil Rights/Liberties	7		5	2	7
Criminal	40	5	28	17	45
Federalism/Separation of Powers	1	1	2		2
Freedom of Speech and Association	3	1	2	2	4
Free Exercise Clause	1		1		1
Establishment Clause	2		1	1	2
Immigration	7	1	3	5	8
Prisoner Rights	4		2	2	4
Reproductive Rights	1			1	1
Substantive Due Process/Equal Protection	8	2	4	6	10
Grand Total	**89**	**19**	**60**	**48**	**108**
Percentages	**82.4%**	**17.6%**	**55.6%**	**44.4%**	**100.0%**