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**Before the United States Senate Committee on the Judiciary on the Nomination of Judge Samuel A. Alito, Jr. to the United States Supreme Court**

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Thank you, Mr. Chairman and Members of the Committee, for inviting me today. I am honored to have this opportunity to testify on the nomination of Judge Samuel Alito, Jr. to the United States Supreme Court.

My name is Goodwin Liu. I am Assistant Professor of Law at Boalt Hall School of Law at the University of California at Berkeley. My areas of expertise include constitutional law, civil rights, and the Supreme Court. Before joining the Boalt faculty, I practiced appellate litigation at O'Melveny & Myers in Washington, D.C. I clerked at the United States Supreme Court for Justice Ruth Bader Ginsburg in 2000-01 and at the United States Court of Appeals for the D.C. Circuit for Judge David Tatel in 1998-99.

I begin my testimony with a point on which everyone agrees: Judge Alito has an exceptionally talented legal mind. Over his fifteen-year tenure on the United States Court of Appeals for the Third Circuit, his opinions have demonstrated sharp analysis, lawyerly craft, and impressive mastery of complex issues. He clearly possesses the intellectual abilities required for appointment to the Nation's highest court.

Intellect, however, is a necessary but not sufficient credential. Equally important are the subtle qualities of judging that give the law its legitimacy, humanity, and semblance of justice. We care about the nominee's "judicial philosophy," a somewhat amorphous term that encompasses his perspective on the proper role of courts in a constitutional democracy. I would like to focus on one concern about Judge Alito's judicial philosophy that is especially troubling for the times in which we live.

That concern is Judge Alito's lack of skepticism toward government power that infringes on individual rights and liberties. Throughout his career, with few exceptions, Judge Alito has sided with the police, prosecutors, immigration officials, and other government agents, while taking a minimalist approach to recognizing official error and abuse. He is less concerned about government overreaching than federal appeals judges nationwide, less concerned than Republican-appointed appeals judges nationwide, and less concerned than his Republican-appointed colleagues on the Third Circuit (see Appendix A). In this area, Judge Alito's record is at the margin of the judicial spectrum, not the mainstream. His deferential instinct toward government is at odds with the Supreme Court's vital role in protecting privacy, freedom, and due process of law, and it deserves special concern in light of the questionable tactics being used to fight the War on Terror.



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## I. JUDICIAL REVIEW AND LIMITS ON GOVERNMENT ABUSE

Judicial review has always had an uneasy existence in our democracy. It is extraordinary that we allow nine unelected individuals with life tenure to examine and invalidate judgments that reflect the popular will. Accordingly, we expect judges to exhibit modesty and restraint. This is especially true in disputes over the allocation of power between Congress and the states. Because the democratic process itself has important safeguards against the undue concentration of power in either level of government, federal courts have a limited role in reviewing Congress's judgments in such cases.

But there are other cases where more robust judicial review is legitimate and necessary. The Bill of Rights, the Due Process Clause, and the Equal Protection Clause, among other provisions, limit government power in order to protect individual rights and liberties. It has long been the responsibility of federal courts, and the Supreme Court in particular, to enforce these guarantees precisely because they are insulated from ordinary politics. The Founding generation knew well the abuses of executive power and the need for an independent judiciary to keep government in check. In a 1789 speech proposing the Bill of Rights, James Madison envisioned that "independent tribunals of justice will consider themselves . . . the guardians of [individual] rights" and "will be naturally led to resist every encroachment" on these rights by the political branches.[1]

Much of the Supreme Court's authority and prestige is rooted in its faithful discharge of this role. Cases such as *Brown v. Board of Education*, *Gideon v. Wainwright*, and *Katz v. United States* validate the Court's role as ultimate protector of individual rights and our self-image as a Nation dedicated to the rule of law.[2] Conversely, the failure to resist government power in the name of individual rights has produced some of the Court's and the Nation's most shameful episodes.[3] Today, cases challenging government power comprise nearly half of the Supreme Court's docket. It is thus critical to examine how Judge Alito would approach these issues if confirmed.

## II. PRIVACY, SECURITY, AND THE FOURTH AMENDMENT

Judge Alito has looked skeptically upon government power in some cases involving free speech and religious liberty.[4] But in his record as a whole, those decisions are

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1 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1789).

2 *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (forbidding racial segregation); Gideon v. Wainwright, 372 U.S. 335 (1963) (guaranteeing counsel to every person accused of crime); Katz v. United States, 389 U.S. 347 (1967) (prohibiting government wiretapping without a warrant).

3 *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (upholding internment of over 120,000 persons of Japanese ancestry during World War II, the vast majority of whom were United States citizens).

4 *See* Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2004); Swartzwelder v. McNeilly, 297 F.3d 228 (3d Cir. 2002); Saxe v. State College Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999); Mitchum v. Hurt, 73 F.3d 30 (3d Cir. 1995). *But see* Banks v. Beard, 399 F.3d 134, 148 (3d Cir. 2005) (Alito, J., dissenting) (defending indefinite denial of inmate access to family photographs and reading materials, despite no record evidence that such denial served a penological purpose).

exceptions to a disturbing pattern of deference toward the use of government power against individuals. Perhaps the most troubling aspect of this pattern is Judge Alito's cramped reading of the Fourth Amendment's prohibition on unreasonable searches and seizures, a vital safeguard that grew directly out of colonial resistance to abuses by the Crown. In his career, Judge Alito has never taken a position more receptive to individual privacy or security than the position taken by his colleagues on the same panel.[5]

### A. POLICE USE OF EXCESSIVE FORCE

The Fourth Amendment right against unreasonable seizures prohibits police from using excessive force in an arrest, detention, or investigatory stop. Judge Alito has taken a very narrow view of what constitutes excessive force, beginning with the fifteen-page Justice Department memorandum he wrote in 1984 concluding that the use of deadly force against a fleeing unarmed suspect does not violate the Fourth Amendment.[6]

The memorandum examined a case in which Memphis police officers in 1974, responding to a burglary complaint, arrived at a house, heard a door slam, and saw someone running across the backyard. The suspect reached a fence, at which point an officer called out "police, halt." When the suspect began to climb the fence, the officer shot him in the back of the head, killing him. The suspect, Edward Garner, was an eighth-grader, fifteen years old, 5'4" tall, 100 to 110 pounds, and black.[7] Police found a purse and $10 taken from the house on his body. It was undisputed that the officer believed Garner was unarmed. The sole justification offered for the killing was to prevent escape. The Sixth Circuit found the shooting unconstitutional, holding that deadly force against a fleeing suspect is impermissible unless there is "probable cause . . . that the suspect poses a threat to the safety of the officers or a danger to the community if left at large."[8]

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[5] This fact is revealed by his votes in the 14 Fourth Amendment cases in his record that resulted in a divided panel: Johnson v. Knorr, 130 Fed. Appx. 552 (3d Cir. 2005); Feldman v. Community College of Allegheny, 85 Fed. Appx. 821 (3d Cir. 2004); Doe v. Groody, 361 F.3d 232 (3d Cir. 2004); United States v. Lee, 359 F.3d 194 (3d Cir. 2004); Grazier ex rel. White v. City of Philadelphia, 328 F.3d 120 (3d Cir. 2003); United States v. $92,422.57, 307 F.3d 137 (3d Cir. 2002); United States v. Nelson, 284 F.3d 472 (3d Cir. 2002); United States v. Zimmerman, 277 F.3d 426 (3d Cir. 2002); Pryer v. C.O. 3 Slavic, 251 F.3d 448 (3d Cir. 2001); Torres v. McLaughlin, 163 F.3d 169 (3d Cir. 1998); Mellott v. Heemer, 161 F.3d 117 (3d Cir. 1998); United States v. Brown, 159 F.3d 147 (3d Cir. 1998); United States v. Kithcart, 134 F.3d 529 (3d Cir. 1998); Baker v. Monroe Township, 50 F.3d 1186 (3d Cir. 1995). *See* Robert Gordon, *Alito or Scalito? If You're a Liberal, You'd Prefer Scalia*, SLATE, Nov. 1, 2005.

[6] Memorandum from Samuel A. Alito to the Solicitor General on *Memphis Police Department v. Garner*, Nos. 83-1035, 83-1070 (May 18, 1984), *available at* http://www.archives.gov/news/samuel-alito/-accession-060-89-216/MemphisPol-v-Garner-1984-box19-memoAlitotoSolicitorGeneral.pdf [hereinafter *Garner* Memorandum]. At the time, Judge Alito served as Assistant to the Solicitor General.

[7] At the time Judge Alito wrote his memorandum, it was well-established that the rate at which blacks were shot by the police was far higher than the comparable rate for whites, both nationally and specifically in Memphis. *See* James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707, 707-08, 718-20 (1982). Moreover, blacks in Memphis were shot more often than whites in circumstances posing no threat to the officer. *See id.* at 720 (reporting "a black death rate from police shootings while unarmed and nonassaultive . . . that is 18 times higher than the comparable white rate"). Despite the clear racial undertones of Garner's case, Judge Alito nowhere considered the issue.

[8] Garner v. Memphis Police Dep't, 710 F.2d 240, 246 (6th Cir. 1983).

In his memorandum, Judge Alito said the Sixth Circuit was "wrong."[9] He acknowledged that the officer "could see that his target was a youth who did not appear to be armed."[10] In addition, the officer "had no way of knowing precisely what the suspect had done."[11] Still, Judge Alito concluded: "I think the shooting can be justified as reasonable within the meaning of the Fourth Amendment."[12] In a chilling passage, he wrote:

> Any rule permitting the use of deadly force to stop a fleeing suspect must rest on the general principle that ***the state is justified in using whatever force is necessary to enforce its laws***. Assuming that a fleeing suspect is entirely rational . . . , what he is saying in effect is: "Kill me or alow [sic] me to escape, at least for now." If every suspect could evade arrest by putting the state to this choice, societal order would quickly break down.[13]

Judge Alito's dire prediction is difficult to square with his own observation three pages later that "federal law enforcement agencies . . . uniformly restrict the use of deadly force by their agents at least as strictly (and generally more strictly) then [sic] the court of appeals' rule."[14] Similarly, 87% of municipal and police department policies at that time explicitly prohibited the use of deadly force in cases like Garner's.[15] Judge Alito offered no evidence that these policies had caused "societal order" to "quickly break down."

In 1985, the Supreme Court, in an opinion by Justice White, rejected Judge Alito's position and affirmed the Sixth Circuit's rule, declaring: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead."[16]

On the bench, Judge Alito has continued to take a constricted view of excessive force. In *Baker v. Monroe Township*, over a dozen local and federal narcotics agents raided the apartment of Clementh Griffin just as his mother, Inez Baker, and her three children, Corey, Tiffany, and Jacquine, were arriving for a family dinner.[17] Shouting "Get down," some police officers ran past the Baker family into the apartment, while others forced the Bakers down to the ground, pointed guns at them, handcuffed them, and searched Inez and Corey Baker. The family filed a civil rights suit claiming that the use of guns and handcuffs was excessive force. The Third Circuit, in an opinion by two Reagan appointees, held that the facts entitled the Bakers to a trial. According to the court, "the police used all of those intrusive methods without any reason to feel threat-

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9 *Garner* Memorandum at 3.

10 *Id.* at 2.

11 *Id.* at 12.

12 *Id.*

13 *Id.* at 10 (emphasis added).

14 *Id.* at 13.

15 *See* Tennessee v. Garner, 471 U.S. 1, 19 (1985) (citing K. MATULIA, A BALANCE OF FORCES: A REPORT OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE 161 (1982) (table)).

16 *Id.* at 11.

17 50 F.3d 1186 (3d Cir. 1995).

ened by the Bakers, or to fear the Bakers would escape. . . . [T]he appearances were those of a family paying a social visit, and . . . there is simply no evidence of anything that should have caused the officers to use the kind of force they are alleged to have used."[18] Judge Alito dissented, finding the events "terrifying" and "most unfortunate" for the Bakers but insufficient to warrant relief.[19]

Judge Alito also found no excessive force in *Mellott v. Heemer*, where seven state troopers and federal marshals carrying sawed-off shotguns and semiautomatic rifles evicted a family from their home on a dairy farm which had gone bankrupt.[20] Upon entering, the marshals "pumped" their guns to load them, pointed the guns "right in [the] face" of two persons in the home, "pushed" and "shoved" the residents, and ordered them to "sit still" and "shut the hell up."[21] Finding "virtually no evidence of resistance during the eviction," Judge Alito nevertheless upheld the use of force because the family had earlier refused to obey an eviction order and had made threats against any federal agent coming onto the property.[22] The dissent observed that "whatever fear the marshals had to cause them to descend on the Mellott farm with guns blazing was immediately dissipated when they encountered a pastoral scene of several people sitting peaceably in a parlor. . . . [T]he clearly passive conduct of those present should have caused them to adjust their response to the situation accordingly."[23]

### B. WARRANTLESS ELECTRONIC SURVEILLANCE

Judge Alito has also taken a minimalist view of the Fourth Amendment right to privacy. In *United States v. Lee*, he upheld the FBI's installation of a video and audio surveillance device in a hotel room where the target of a bribery sting, Robert Lee, was staying and holding meetings with an associate, Douglas Beavers, who (unbeknownst to Lee) was cooperating with the FBI.[24] The FBI conducted the surveillance without a warrant, defending it on the ground that Lee had no expectation of privacy in his meetings with Beavers and that the monitoring device was turned on only when Beavers was in the room. Judge Alito accepted the FBI's argument and found no violation.[25]

However, the Supreme Court has said that an overnight guest in a hotel room enjoys the same strong expectation of privacy that applies in the home.[26] In *Lee*, the surveillance device remained in Lee's room even when Beavers was not there. As the dissent observed, the FBI had "the ability to manipulate a video camera to see and hear practically everything that Lee did in the privacy of his hotel suite throughout the day and

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18 *Id.* at 1193 (Gibson, J. (sitting by designation), joined by Becker, J.).

19 *Id.* at 1202-03 (Alito, J., dissenting).

20 161 F.3d 117 (3d Cir. 1998).

21 *Id.* at 120-21.

22 *See id.* at 122-23.

23 *Id.* at 126 (Rendell, J., dissenting).

24 359 F.3d 194 (3d Cir. 2004).

25 *See id.* at 203.

26 *See* Minnesota v. Olson, 495 U.S. 91, 99 (1990).

night."[27] This "Orwellian capability" was limited only by "the government's self-imposed restraint."[28] Judge Alito nowhere explained why such restraint—essentially a promise by the FBI to use the camera only when Beavers was in the room—should defeat the Fourth Amendment warrant requirement. That requirement "interpose[s] a magistrate between the citizen and the police" *precisely because* the right of privacy is "too precious to entrust to the discretion of [law enforcement]."[29]

Although *Lee* involved a domestic criminal investigation, Judge Alito's readiness to indulge government discretion without judicial safeguards raises concerns as to how he would approach issues like the National Security Agency's program of domestic eavesdropping—also conducted without a warrant and defended on the basis of executive discretion and self-restraint. As Justice Brandeis once said: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[30]

In *Lee*, Judge Alito also showed no hesitation to allow the use of increasingly sophisticated surveillance technology. While conceding that "video surveillance may involve a greater intrusion on privacy than audio surveillance," Judge Alito saw "no constitutionally relevant distinction" between the two,[31] even though the remote-controlled camera captured details of Lee's room beyond what Beavers could see at any given time.[32] A sharp contrast to Judge Alito's instincts is Justice Scalia's majority opinion in *Kyllo v. United States*.[33] In *Kyllo*, federal agents parked across the street from the defendant's home used a thermal-imaging device to detect heat lamps used to grow marijuana inside the home. The Supreme Court held that use of the device without a warrant violated the Fourth Amendment. "In the home," Justice Scalia said, "*all* details are intimate details, because the entire area is held safe from prying government eyes."[34] Privacy expectations in the home should not be left "at the mercy of advancing technology."[35]

### C. DEFECTIVE WARRANTS

Where police have obtained a search warrant but exceeded its scope, Judge Alito (whom some have called a "strict constructionist"[36]) has creatively interpreted the war-

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27 *Id.* at 214 (McKee, J., dissenting).

28 *Id.*

29 *Id.* at 225.

30 Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

31 *Lee*, 359 F.3d at 202.

32 Although Lee had no legitimate expectation of privacy in what Beavers could see during their meetings, he retained an expectation of privacy in what Beavers could *not* see at any given time. *See Lee*, 359 F.3d at 217-18 (McKee, J., dissenting).

33 533 U.S. 27 (2001).

34 *Id.* at 37.

35 *Id.* at 35.

36 *See, e.g.*, Charles Babington & Michael A. Fletcher, *Alito Signals Reluctance to Overturn* Roe v. Wade, WASH. POST, Nov. 9, 2005, at A1 (quoting Senator Lindsey Graham); Robin Toner & Adam Liptak,

rant to patch the defect. Much has been said about *Doe v. Groody*, where Judge Alito dissented from an opinion by then-Judge Michael Chertoff invalidating the strip search of a ten-year-old girl in her father's home.[37] There, the warrant authorized the police to search only the father and his residence for illegal drugs. Judge Alito argued that the warrant should be read to incorporate the police affidavit seeking the warrant, which had requested authority to search "all occupants" of the home.[38] As Judge Chertoff noted, however, an affidavit cannot expand the warrant's scope unless the warrant *expressly* incorporates the affidavit, which the warrant at issue did not do.[39] This rule, which Judge Alito all but ignored, "goes to the heart of the constitutional requirement that judges, and not the police, authorize warrants."[40]

Judge Alito similarly tried to salvage a defective warrant in *Baker v. Monroe Township* discussed above.[41] The warrant had "x" marks indicating a search of "premises," "person[s]," and "vehicle[s]" for illegal drugs, but it described only the residence and not the persons or vehicles to be searched. In executing the warrant, the police conducted a full evidentiary search of Corey Baker, a boy who was visiting as a family dinner guest. The two Reagan appointees in the majority flatly held that the warrant did not authorize the search.[42] In dissent, Judge Alito construed the warrant to authorize the search of "any persons found on the premises"[43] despite no such language in the warrant.

Judge Alito also excused a defective warrant in *United States v. $92,422.57*, where Secret Service agents seized business records from a grocery company suspected of participating in food stamp fraud from 1994 to 1997.[44] The warrant authorized seizure of receipts, invoices, lists of business associates, delivery schedules, financial statements, computers, and software with no restrictions as to the time period, transactions, or crimes involved. In essence, the warrant allowed the agents to search through documents of any sort dating back to the company's opening in 1983, more than a decade before any alleged crime. Despite the Fourth Amendment's requirement that a warrant must "particularly describ[e] . . . the persons or things to be seized," Judge Alito excused the warrant's lack of particularity on the ground that "it was necessary to search for and seize all of the files in which a record of [legitimate] transactions would have been kept" in order to

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*2 Camps, Playing Down Nuances, Stake Out Firm Stands*, N.Y. TIMES, Nov. 1, 2005, at A25 (quoting Tony Perkins, president of the Family Research Council).

37 361 F.3d 232 (3d Cir. 2004).

38 *See id.* at 245-48 (Alito, J., dissenting).

39 *See id.* at 239 (citing Bartholomew v. Pennsylvania, 221 F.3d 425, 428 & n.4 (3d Cir. 2000), and Groh v. Ramirez, 540 U.S. 551, 557-58 (2004)).

40 *Id.* at 244. In any event, the affidavit stated no probable cause to search the girl, since the request to search "all occupants" of the home emphasized the possible concealment of drugs by "frequent visitors that purchase [drugs]" or by "persons who do not actually reside or own/rent the premises," *id.* at 236 (quoting affidavit), not by a ten-year-old girl living in the home. In finding probable cause for the search, Judge Alito ignored this language in the affidavit. *See id.* at 245 (Alito, J., dissenting).

41 50 F.3d 1186 (3d Cir. 1995).

42 *See id.* at 1194-95.

43 *Id.* at 1198 (Alito, J., dissenting).

44 307 F.3d 137 (3d Cir. 2002).

show that the company was not engaged in legitimate transactions.[45] As the dissent explained, this inverted logic—allowing the government "to seek evidence of legitimate, not illegitimate, conduct"—"essentially endorses a fishing expedition" with no limits.[46]

Even in *United States v. Kithcart*, a rare case in which Judge Alito found lack of probable cause to search and arrest the defendant, his opinion for the court was limited.[47] There, a police officer pulled over a black Nissan 300ZX driven by the defendant, a black male, after hearing reports of robberies in the area by two black males in a black sports car described as a Camaro Z-28. Judge Alito held that, based on the reports, the officer "could not justifiably arrest any African-American man who happened to drive by in any type of black sports car."[48] However, he left open the possibility on remand that the stop could be justified if the officer had "a reasonable suspicion that 'criminal activity may be afoot.' "[49] Dissenting from this portion of the opinion, Judge Theodore McKee observed that Judge Alito failed to "follow[] the obvious extension of [his] own logic. Just as the record fails to establish that Officer Nelson had probable cause to arrest any Black male who happened to drive by in a black sports car, it also fails to establish reasonable suspicion to justify stopping any and all such cars that happened to contain a Black male."[50]

## III. CRIMINAL JUSTICE AND DUE PROCESS OF LAW

Judge Alito has shown as much deference to criminal prosecutions as he has to the police. At a time when America's commitment to due process of law is being closely scrutinized at home and abroad, his record raises serious concerns.

### A. INEFFECTIVE ASSISTANCE OF COUNSEL

The role of defense counsel "is critical to the ability of the adversarial system to produce just results."[51] Thus the Sixth Amendment guarantees "effective assistance of counsel."[52] This right is violated when counsel's performance falls "below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[53]

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45 *Id.* at 150.

46 *Id.* at 157 (Ambro, J., dissenting).

47 134 F.3d 529 (3d Cir. 1998).

48 *Id.* at 532. In this unanimous holding, Judge Alito was joined by Judge Timothy Lewis and Judge Theodore McKee.

49 *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)).

50 *Id.* at 533 (McKee, J., concurring in part and dissenting in part). Apart from *Kithcart*, I have found only one other case where Judge Alito detected a Fourth Amendment violation. In *Leveto v. Lapina*, 258 F.3d 156 (3d Cir. 2001), he wrote a unanimous opinion invalidating the search and detention of a doctor and his wife by IRS agents investigating tax evasion, but then denied relief on the ground that the defendants were entitled to qualified immunity.

51 Strickland v. Washington, 466 U.S. 668, 685 (1984).

52 *Id.* at 686.

53 *Id.* at 688, 694.

In 2004, Judge Alito ruled against a capital defendant, Ronald Rompilla, who claimed ineffective assistance of counsel because his lawyers did not present crucial evidence at his sentencing hearing that might have led the jury to spare his life.[54] Although his lawyers consulted family members and mental health experts, they failed to examine school, medical, and court records containing stark evidence of his troubled childhood and limited mental capacity. Those records showed that Rompilla's parents were severe alcoholics, that his father beat him and kept him locked in an excrement-filled dog pen, that his IQ was in the mentally retarded range, and that he suffered from organic brain damage likely caused by fetal alcohol syndrome.[55] Despite the neglected evidence, Judge Alito concluded that counsel's performance was reasonable. While a "good" or "prudent" lawyer might have examined the records, he argued, Rompilla's lawyers had done all that was "constitutionally compelled."[56]

The Supreme Court reversed, finding Judge Alito's position "objectively unreasonable" under "clearly established" law.[57] The Court cited defense counsel's failure to examine the court file on Rompilla's criminal history and explained: "There is an obvious reason that [this] failure . . . fell below the level of reasonable performance. Counsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law. . . . [T]he prior conviction file was a public document, readily available for the asking at the very courthouse where Rompilla was to be tried."[58] Had the lawyers examined the file, "they would have found a range of mitigation leads that no other source had opened up."[59]

In reaching its holding, the Court relied on the description of defense counsel's obligations in the ABA Standards of Criminal Justice: "It is the duty of the lawyer . . . to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. *The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.*"[60] Remarkably, Judge Alito said he saw "nothing in the quoted portions of the ABA standards that dictates that records of the sort at issue here must always be sought."[61]

Judge Alito also voted to deny an ineffective assistance claim in *United States v. Kauffman*.[62] Kourtney Kauffman pled guilty to firearms charges on his lawyer's advice.

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54 Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004).

55 *See id.* at 243-44; *id.* at 279-80 (Sloviter, J., dissenting).

56 *Id.* at 258-59 (internal quotation marks and citations omitted).

57 *See* Rompilla v. Beard, 125 S. Ct. 2456, 2462 (2005). Justice O'Connor cast the swing vote.

58 *Id.* at 2464.

59 *Id.* at 2468. The Court noted that Pennsylvania "does not even contest" the prejudicial effect of the omission on Rompilla's sentencing. *Id.* at 2467.

60 *Id.* at 2466 (quoting ABA Standards of Criminal Justice 4-4.1 (2d ed. 1982 Supp.)) (emphasis added). The Court added that "[w]e have long referred [to these ABA Standards] as guides to determining what is reasonable." *Id.* (internal quotation marks and citations omitted).

61 *Rompilla*, 355 F.3d at 259 n.14.

62 109 F.3d 186 (3d Cir. 1997).

But his lawyer had failed to investigate an insanity defense despite receiving a letter from a psychiatrist who, upon examining Kauffman on the day of his crime and arrest, had concluded that he "was undoubtedly psychotic at that time."[63] In addition, Kauffman's attending physician, who examined him five days before the crime, said that Kauffman was bipolar and that his "mental status . . . was that of a person whose judgment was markedly compromised, with limited insight and poor reliability."[64] Further, a mental health counselor who saw Kauffman upon his arrest said he "was clearly psychotic at that time."[65] In an opinion by two judges appointed by the first President Bush, the Third Circuit ordered a new trial, finding "no reasonable professional calculation which would support [counsel's] failure to conduct *any* pre-trial investigation into the facts and law of an insanity defense."[66] Judge Alito dissented, crediting defense counsel's belief that "an insanity defense was not likely to be successful"[67] despite multiple expert opinions that Kauffman was psychotic when he committed the crime.

Although Judge Alito has upheld ineffective assistance claims in three instances,[68] *Rompilla* and *Kauffman* are the only two such cases in his record that resulted in a divided panel. In both cases, his position did not prevail.

### B. ERRONEOUS JURY INSTRUCTIONS

A trial court's failure to accurately instruct the jury in a criminal case presents the risk of convicting the defendant without proof beyond a reasonable doubt of all elements of the crime or sentencing the defendant in violation of the law. In several cases, Judge Alito has excused serious errors in jury instructions.

In *Smith v. Horn*,[69] Clifford Smith and Roland Alston robbed a Pennsylvania pharmacy. During the robbery, one of them shot and killed a pharmacist. The state charged Smith with capital murder. But instead of showing he was the shooter, the state alleged that the two men were accomplices and, as such, each was liable for the acts of the other under state law. To convict Smith of murder on this theory, the state had to prove that he intended the killing to occur. However, the trial court's jury instructions failed to make this clear, instead suggesting that Smith could be found guilty of murder

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63 *Id.* at 187 (quoting Dr. Jacob Stacks, a psychiatrist at Harrisburg State Hospital).

64 *Id.* at 188 (testimony of Dr. Denis Milke, medical director of the Edgewater Psychiatric Center, where Kauffman was a patient five days before his arrest).

65 *Id.* at 189 (testimony of Patrick Gallagher, mental health counselor at York County Prison, where Kauffman was jailed after his arrest).

66 *Id.* at 190 (Lewis, J., joined by Roth, J.).

67 *Id.* at 192 (Alito, J., dissenting).

68 *See* Jansen v. United States, 369 F.3d 237 (3d Cir. 2004) (counsel failed to argue that drugs found in defendant's pants were for personal use and could not be considered in calculating drug quantity at sentencing); Carpenter v. Vaughn, 296 F.3d 138 (3d Cir. 2002) (counsel failed to object to trial court's misleading answer to capital sentencing jury's question about availability of parole if jury imposed a life sentence); Coss v. Lackawanna County Dist. Att'y, 204 F.3d 453 (3d Cir. 2000) (en banc) (counsel failed to subpoena any witnesses requested by defendant). Although there were two dissents in *Coss*, neither questioned the court's finding of ineffective assistance of counsel.

69 120 F.3d 400 (3d Cir. 1997).

even if he intended only the robbery and never intended the killing. The jury convicted Smith of murder and sentenced him to death.

In an opinion by two Reagan-appointed former prosecutors, the Third Circuit held that the faulty instructions denied Smith a fair trial because there was "a reasonable likelihood that the jury convicted Smith of first-degree murder without finding beyond a reasonable doubt that he intended that [the victim] be killed."[70] Judge Alito called this conclusion "shocking," "dangerous," and "an injustice."[71] He argued that the trial court had properly stated the intent requirement in an earlier part of the instructions defining accomplice liability.[72] Yet, as Judge Alito conceded, the term "accomplice" is "a complicated legal term," and the instructions as a whole were "ambiguous" and "inadvisable."[73]

Judge Alito further argued that the court should not have heard Smith's claim at all because his lawyers did not object to the jury instructions at trial or in prior appeals.[74] This argument was extraordinary because "the Commonwealth never raised . . . these issues at any time: not in the district court, not in its briefing before this Court, and not at oral argument."[75] In raising this argument on his own, Judge Alito apparently took upon himself the task of combing through the trial transcript and entire record of post-conviction proceedings in an effort "to protect state prerogatives."[76] Rejecting this argument, the court warned that it would "subtly transform our adversarial system into an inquisitorial one."[77] "[W]here the state has never raised the issue at all, in any court, raising the issue *sua sponte* puts us in the untenable position of ferreting out possible defenses upon which the state has never sought to rely. When we do so, we come dangerously close to acting as advocates for the state rather than as impartial magistrates."[78]

In another case involving erroneous jury instructions, *Virgin Islands v. Smith*, Judge Alito again dissented from an opinion by two Reagan appointees.[79] In *Virgin Islands*, a first-degree murder case in which the defendant argued self-defense, the district court failed to instruct the jury that under Virgin Islands law the prosecutor had to prove the absence of self-defense beyond a reasonable doubt. The majority held that this error "undermined the fundamental fairness of the trial, and constituted plain error."[80] In dissent, Judge Alito said that, while "it is *possible* that the jury might have been confused

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70 *Id.* at 411 (Cowen, J., joined by Mansmann, J.).

71 *Id.* at 424, 426 (Alito, J., dissenting).

72 *See id.* at 423-24.

73 *Id.* at 423, 424, 425.

74 *See id.* at 420-23.

75 *Id.* at 407.

76 *Id.* at 422 (Alito, J., dissenting). Although federal courts do have some discretion to raise procedural issues *sua sponte*, Smith's case presented none of the circumstances warranting such a move. *See id.* at 407-09 (discussing factors in *Granberry v. Greer*, 481 U.S. 129 (1987)).

77 *Id.* at 409.

78 *Id.*

79 949 F.2d 677 (3d Cir. 1991) (Scirica, J., joined by Becker, J.).

80 *Id.* at 686.

about the burden of proof regarding self-defense," "the likelihood that the defendant was prejudiced . . . is insufficient to establish the presence of plain error."[81]

Judge Alito also excused defective jury instructions in the cases of death-row inmates William Flamer and Billie Bailey.[82] Both cases involved a Delaware statute that directs juries, in deciding whether to recommend death, to weigh any aggravating circumstances of a capital offense against any mitigating circumstances. Although the statute lists certain aggravating factors, it does not require the jury to focus on the listed factors in making its decision. Yet the trial court in both cases required the jury to indicate on a written questionnaire "which statutory aggravating circumstance or circumstances were relied upon" if the jury chose the death penalty. In each case, the jury chose death and indicated that one of the statutory factors supporting its decision was that "[t]he murder was outrageously or wantonly vile, horrible, or inhuman."[83] Later, in a separate case, the Delaware Supreme Court found this statutory factor unconstitutionally vague, thereby calling into question Flamer's and Bailey's death sentences.

In the Third Circuit, there was little dispute that the questionnaire was flawed, since statutory aggravating factors are to play no role in guiding the jury's discretion under Delaware law. In a majority opinion, Judge Alito "strongly disapprove[d]" of the questionnaire, calling it "potentially misleading" and a source of "unnecessary confusion."[84] Still, he upheld the death sentences, finding no risk that the questionnaire had caused the juries to give inordinate weight to the invalid aggravating factor. Four dissenting judges said the questionnaire wrongly focused the jury's attention on the statutory factors. The invalid factor "may well have . . . tipped the scale in favor of death."[85]

### C. RACIAL DISCRIMINATION IN JURY SELECTION

In 2001, Judge Alito sided with the state against a black man, James Riley, convicted of killing a white man by an all-white jury in Kent County, Delaware, whose population is 20 percent black.[86] Before trial, the prosecutor had struck all three prospective black jurors from the jury pool. Riley challenged this action as racially discriminatory under *Batson v. Kentucky*, which forbids prosecutors from removing potential jurors based on race.[87] To support his claim, Riley showed that the prosecution had struck black but not white jurors who had given the same testimony at voir dire. He also showed that the prosecution had struck every prospective black juror in the three other capital murder trials in Kent County within the prior year.

Judge Alito refused to infer racial discrimination from this pattern, stating that "a careful multiple-regression analysis" would be necessary to determine whether the strikes

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81 *Id.* at 689 (Alito, J., dissenting).

82 Flamer v. Delaware, 68 F.3d 736 (3d Cir. 1995) (en banc) (consolidated with *Bailey v. Snyder*).

83 *Id.* at 741, 744 (citing Del. Code Ann. tit. 11, § 4209(e)(1)(n)).

84 *Id.* at 754 n.20.

85 *Id.* at 771 (Lewis, J., dissenting); *see id.* at 776 (Sarokin, J., dissenting).

86 Riley v. Taylor, 277 F.3d 261 (3d Cir. 2001) (en banc).

87 476 U.S. 79 (1986).

were based on race or some other variable.[88] To support his point, he said: "Although only about 10% of the population is left-handed, left-handers have won five of the last six presidential elections. . . . But does it follow that the voters cast their ballots based on whether a candidate was right- or left-handed?"[89] The Third Circuit *en banc* disagreed with Judge Alito and upheld the *Batson* claim, criticizing his analogy for "minimiz[ing] the history of discrimination against prospective black jurors and black defendants."[90]

In contrast to Judge Alito's approach, the Supreme Court recently inferred racial discrimination in jury selection from a statistical pattern without requiring "careful multiple-regression analysis." In *Miller-El v. Dretke*, the Court reversed the conviction of a black defendant convicted of murder and sentenced to death by a jury seated after the prosecution had struck ten out of eleven black persons on the venire.[91] In an opinion joined by Justice O'Connor, the Court had no difficulty concluding that the racial pattern was "unlikely" the product of "[h]appenstance."[92]

Judge Alito has twice voted to uphold *Batson* claims; both cases involved strong evidence of *Batson* violations and produced unanimous decisions.[93] In the two *Batson* cases in his record that resulted in a divided panel, he rejected the claim each time.[94]

### D. THE DEATH PENALTY

The issue of capital punishment deserves a brief word for two reasons. First, capital cases comprise a significant portion of the Supreme Court's docket. In this area, the Court often serves as a forum of last resort to correct errors in individual cases. Second, capital cases require judges to exercise utmost care in ensuring due process of law, an imperative underscored by findings of remarkably high error rates in capital proceedings[95] and by recent Supreme Court decisions, with Justice O'Connor's assent, granting

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88 *Id.* at 327 (Alito, J., dissenting).

89 *Id.*

90 *Id.* at 292. The court also found Riley's death sentence invalid because the prosecutor had misled the jury. *See id.* at 298. Judge Alito dissented from this holding too. *See id.* at 330 (Alito, J., dissenting).

91 125 S. Ct. 2317 (2005).

92 *Id.* at 2325 (internal quotation marks and citation omitted).

93 *See* Brinson v. Vaughn, 398 F.3d 225 (3d Cir. 2005) (prosecutor used thirteen out of fourteen strikes against black jurors and had appeared on a training videotape advocating the use of peremptory strikes against blacks); Jones v. Ryan, 987 F.2d 960 (1993) (prosecutor failed to provide specific, non-pretextual reasons for striking three out of four potential black jurors). In a separate case on the right to an impartial jury, Judge Alito wrote a unanimous opinion requiring the district court to consider evidence of racial bias on the part of one member of the jury. *See* Williams v. Price, 343 F.3d 223 (3d Cir. 2003).

94 In addition to *Riley*, Judge Alito voted to deny the *Batson* claim in *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1992), even though the trial judge had used an expressly race-conscious method of jury selection. *See id.* at 1242 (Alito, J., concurring). Judge Alito dissented from the denial of rehearing *en banc* in another *Batson* case, *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir. 1995). In *Simmons*, three Reagan appointees unanimously ordered a new trial where the defendant had raised a colorable *Batson* claim whose resolution was prejudiced by a 13-year delay between his conviction and direct appeal.

95 *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000) (reporting 68% overall rate of prejudicial error in capital cases between 1973 and 1995).

relief to capital defendants because of flawed jury instructions, ineffective assistance of counsel, racial discrimination in jury selection, and prosecutorial misconduct.[96]

In the four capital cases in his record producing a divided panel, Judge Alito each time argued vigorously against granting relief.[97] In two instances (*Smith* and *Riley*), he failed to persuade his colleagues. In a third instance (*Rompilla*), he was reversed by the Supreme Court. Although Justice O'Connor's approach to capital punishment has been conservative, she has at times supplied a crucial vote in contentious cases in favor of greater care and fairness in the application of the death penalty. Yet it is precisely in the most contentious cases that Judge Alito has shown a uniform pattern of excusing errors and eroding norms of basic fairness.

## IV. DEPORTATION, ASYLUM, AND DUE PROCESS OF LAW

Judge Richard Posner recently observed that adjudication of deportation and asylum cases by federal immigration judges and the Board of Immigration Appeals (BIA) "has fallen below the minimum standards of legal justice."[98] Noting "a staggering 40 percent" reversal rate of BIA decisions in the Seventh Circuit, Judge Posner said that "[o]ur criticisms of the Board and of the immigration judges have frequently been severe" and that "the problem is not of recent origin."[99] The Third Circuit, in unanimous decisions by bipartisan panels, has been similarly critical.[100] However, despite these concerns and the important life and liberty interests are at stake, Judge Alito has taken a narrow view of judicial safeguards against government error in immigration cases.

In *Sandoval v. Reno*, Judge Alito wrote a dissent arguing that the Antiterrorism and Effective Death Penalty Act of 1996 eliminated district court review of habeas claims filed by certain aliens held in custody pursuant to a deportation order.[101] Yet, as the panel majority explained, Judge Alito failed to read the statute in light of "[o]ver a century's worth of precedent and practice [that] unambiguously supports the conclusion that habeas jurisdiction is available to aliens in executive custody."[102] Adhering to the settled rule that "courts should not lightly presume that a congressional enactment containing general language effects a repeal of a jurisdictional statute,"[103] the court read the statute to preserve the availability of habeas relief in district court for aliens facing deportation. Judge

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96 *See* Rompilla v. Beard, 125 S. Ct. 2456 (2005); Miller-El v. Dretke, 125 S. Ct. 2317 (2005); Deck v. Missouri, 125 S. Ct. 2007 (2005); Smith v. Texas, 543 U.S. 37 (2004); Tennard v. Dretke, 542 U.S. 274 (2004); Banks v. Dretke, 540 U.S. 668 (2004); Wiggins v. Smith, 539 U.S. 510 (2003).

97 The four cases—*Rompilla*, *Smith v. Horn*, *Riley*, and *Flamer*—have been discussed above.

98 Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005).

99 *Id.* at 829, 830 (citing multiple examples).

100 *See, e.g.*, Wang v. Attorney General, 423 F.3d 260 (3d Cir. 2005); Fiadjoe v. Attorney General, 411 F.3d 135 (3d Cir. 2005); Korytnyuk v. Ashcroft, 396 F.3d 272 (3d Cir. 2005).

101 166 F.3d 225, 242-43 (3d Cir. 1999) (Alito, J., concurring in part and dissenting in part).

102 *Id.* at 237.

103 *Id.* at 232 (citing Ex parte McCardle, 74 U.S. 506 (1868), Ex parte Yerger, 75 U.S. 85 (1868), and Felker v. Turpin, 518 U.S. 651 (1996)).

Alito's view in *Sandoval* was rejected by nine other federal courts of appeals and by the Supreme Court.[104] In construing AEDPA, the vast majority of judges, but not Judge Alito, have sought to preserve judicial safeguards against erroneous deportation.

On the merits of individual asylum and deportation cases, Judge Alito has voted to grant relief on several occasions,[105] but never in a case with a divided panel. In such cases (there are six, including *Sandoval*), he has uniformly sided with the government, almost always in dissent. In *Tipu v. INS*, Judge Alito dissented from an opinion by two Republican-appointed colleagues remanding a deportation order for proper consideration of evidence in the petitioner's favor.[106] In *Chang v. INS*, Judge Alito again dissented from an opinion by two Republican appointees reversing the BIA's denial of eligibility for discretionary asylum based on political persecution.[107] In *Dia v. Ashcroft*, he dissented from an *en banc* majority holding that the BIA lacked substantial evidence for its determination that the asylum applicant was not credible.[108] In *Lee v. Ashcroft*, he dissented from the court's holding that filing a false tax return is not an aggravated felony rendering an alien deportable.[109] Finally, in *Singh-Kaur v. Ashcroft*, Judge Alito voted to affirm a deportation order based on a questionable BIA finding that the petitioner had provided "material support" for terrorist activities, despite a vigorous dissent by Judge Michael Fisher who, like Judge Alito, was appointed by the first President Bush.[110]

## V. AT THE MARGIN, NOT THE MAINSTREAM

On the whole, Judge Alito is more deferential toward government than his Third Circuit colleagues, whether appointed by a Democrat or Republican; more deferential than federal appeals judges nationwide; and more deferential than Republican-appointed appeals judges nationwide. From 1990 to 1996, in criminal cases with divided panels, federal appeals judges agreed with the government 54% of the time, and Republican appointees agreed with the government 65% of the time. By contrast, Judge Alito has

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104 *See* INS v. St. Cyr, 533 U.S. 289, 310 (2001); *id.* at 310 n.33 ("the overwhelming majority of Courts of Appeals concluded that district courts retained habeas jurisdiction under § 2241 after AEDPA").

105 *See* Oyebanji v. Gonzales, 418 F.3d 260 (3d Cir. 2005); Partyka v. Attorney General, 417 F.3d 408 (3d Cir. 2005); Farah v. Gonzales, 140 Fed. Appx. 405 (3d Cir. 2005); Dodaj v. Attorney General, 128 Fed. Appx. 289 (3d Cir. 2005); Zhang v. Gonzales, 405 F.3d 150 (3d Cir. 2005); Liu v. Ashcroft, 372 F.3d 529 (3d Cir. 2004).

106 20 F.3d 580 (3d Cir. 1994) (Roth, J., joined by Becker, J.); *see id.* at 587 (Alito, J., dissenting). The petitioner had a brother undergoing dialysis who was dependent on him for emotional and financial support. Further, the petitioner had played only a minor role in the deportable offense, had shown complete rehabilitation, and worked as a cab driver.

107 119 F.3d 1055 (3d Cir. 1997) (Roth, J., joined by Lewis, J.); *see id.* at 1068 (Alito, J., dissenting).

108 353 F.3d 228 (3d Cir. 2003) (en banc); *see id.* at 266 (Alito, J., dissenting).

109 368 F.3d 218 (3d Cir. 2004); *see id.* at 225 (Alito, J., dissenting).

110 385 F.3d 293 (3d Cir. 2004); *see id.* at 301 (Fisher, J., dissenting). The petitioner, a native of India, had provided food and set up tents for meetings of a Sikh group opposed to the Indian government. Judge Alito held that the Sikh group was engaged in terrorist activity and that petitioner's provision of food and tents constituted "material support." But the undisputed evidence showed that the petitioner disclaimed any connection to violence and that the meetings he assisted were for religious purposes. *See id.* at 308-10.

agreed with the government 90% of the time in such cases. In disputed immigration cases, federal appeals judges agreed with the government 33% of the time, and Republican appointees agreed with the government 40% of the time. Judge Alito has agreed with the government 100% of the time.[111]

Almost every judge, including Judge Alito, aims to be impartial and fair. But every judge comes to the law with a set of values, a philosophy, a central tendency. In cases pitting individual rights against government power, Judge Alito's instincts are clear. He is at the margin of the judicial spectrum, not the mainstream.

On occasion, individual rights are depicted as obstacles that impede law enforcement and allow criminals to go free. But as Justice Frankfurter once said, "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."[112] The Constitution protects the good man and the bad, the rich as well as the poor. The Constitution protects us all, and the rights and liberties we enjoy are only as secure as those enjoyed by others. That is the meaning of the motto inscribed on the front of the Supreme Court: "equal justice under law."

Judge Alito's record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that they won't turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man, absent a multiple regression analysis showing discrimination; and where police may search what a warrant permits, and then some. Mr. Chairman, I humbly submit that this is not the America we know. Nor is it the America we aspire to be.

Thank you, Mr. Chairman. I would be happy to answer any questions the Committee might have.

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[111] The data are from *Which Side Was He On?*, WASH. POST, Jan. 1, 2006, *available at* http://-www.washingtonpost.com/wp-dyn/content/custom/2005/12/30/CU2005123001137.html. Although the *Post* counts *Johnson v. Knorr*, 130 Fed. Appx. 552 (3d Cir. 2005), and *United States v. Kithcart*, 134 F.3d 529 (3d Cir. 1998), as divided panels where Judge Alito voted for the defendant, the pro-defendant holdings he supported in those cases were unanimous. Meanwhile, *United States v. Igbonwa*, 120 F.3d 437 (3d Cir. 1997), which the *Post* counts as an immigration case, was actually a criminal case in which Judge Alito dissented in favor of the defendant. *Partyka v. Attorney General*, 417 F.3d 408 (3d Cir. 2005), which the *Post* counts as a divided panel, was unanimous in granting the alien's petition for review; it was divided only insofar as Judge Alito voted to remand for further proceedings instead of vacating the removal order. With these adjustments, Judge Alito's record contains 29 votes for the government in 32 criminal cases with divided panels, and six votes for the government in six immigration cases with divided panels.

[112] United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

**APPENDIX A**

In many cases pitting individual rights against government power, Judge Alito has taken positions more deferential to government power than his Republican-appointed colleagues on the Third Circuit.

- *Banks v. Beard*, 399 F.3d 134 (3d Cir. 2005). Judge Alito dissented from an opinion by Judge Fuentes (Clinton) joined by Judge Rosenn (Nixon) finding prison restrictions on inmates' reading material in violation of the First Amendment.
- *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004): Judge Alito dissented from an opinion by Judge Chertoff (Bush II) joined by Judge Ambro (Clinton) invalidating the strip search of a ten-year-old girl and her mother.
- *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999): Judge Alito dissented from an opinion by Judge Sloviter (Carter) joined by Judge Scirica (Reagan) construing the Anti-terrorism and Effective Death Penalty Act of 1996 to preserve the availability of habeas relief in district court for aliens facing deportation.
- *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997): Judge Alito dissented from an opinion by Judge Cowen (Reagan) joined by Judge Mansmann (Reagan) finding jury instructions to be unconstitutionally defective.
- *Chang v. INS*, 119 F.3d 1055 (3d Cir. 1997): Judge Alito dissented from an opinion by Judge Roth (Bush I) joined by Judge Lewis (Bush I) reversing the Board of Immigration Appeals' denial of eligibility for discretionary asylum.
- *United States v. Kauffman*, 109 F.3d 186 (3d Cir. 1997). Judge Alito dissented from an opinion by Judge Lewis (Bush I) joined by Judge Roth (Bush I) finding ineffective assistance of counsel.
- *Baker v. Monroe Township*, 50 F.3d 1186 (3d Cir. 1995). Judge Alito dissented from an opinion by Judge Gibson (Reagan) joined by Judge Becker (Reagan) finding unconstitutional the search and seizure of an innocent family during a drug raid.
- *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir. 1995). Judge Alito dissented from the denial of rehearing *en banc* of an opinion by Judge Nygaard (Reagan) joined by Judge Hutchinson (Reagan) and Judge Cowen (Reagan) granting defendant a new trial upon finding a colorable *Batson* claim that was prejudiced by a thirteen-year delay between conviction and direct appeal.
- *Tipu v. INS*, 20 F.3d 580 (3d Cir. 1994): Judge Alito dissented from an opinion by Judge Roth (Bush I) joined by Judge Becker (Reagan) remanding a deportation order for proper consideration of evidence in the petitioner's favor.
- *Burkett v. Fulcomer*, 951 F.2d 1431 (3d Cir. 1991). Judge Alito dissented from an opinion by Judge Mansmann (Reagan) joined by Judge Nealon (Kennedy) finding prejudicial denial of defendant's right to a speedy trial.
- *Virgin Islands v. Smith*, 949 F.2d 677 (3d Cir. 1991): Judge Alito dissented from an opinion by Judge Scirica (Reagan) joined by Judge Becker (Reagan) invalidating an erroneous jury instruction on the issue of self-defense.