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The Nominee: Alito

Web Exclusive | Nation

Bush's New Nominee: Not Always on the Same Page as Scalia

A review of Sam Alito's major decisions

By **SEAN SCULLY/PHILADELPHIA**

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SCOTUSblog: Alito's Notable Cases

Posted Monday, Oct. 31, 2005

The conservative bent of judge Sam Alito, who President Bush nominated this morning to the U.S. Supreme Court, has prompted facile comparisons to Justice Antonin Scalia, arguably the most stridently conservative member of the court. But clerks and associates say the comparison, often made with the derisive nickname of "Scalito," does a disservice to the man. "I think he really looks at the facts of the case; he'd be very realistic," says former clerk Katherine K. Huang. "He doesn't have his head in the clouds. He's not going to be carried away by some legal doctrine or some arcane grammatical rule." Huang is referring to a little-known Social Security case in 2002 which may be instructive when it comes to comparing Alito to Scalia.

In that case, Alito argued passionately with other members of the 3rd Circuit Appeals Court that a disabled woman, Pauline

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Thomas, should be granted benefits because she had been laid off from her job as an elevator operator and could not find a new job since the position of "elevator operator" had virtually disappeared from the economy. A lower court had ruled that a narrow and technical reading of the Social Security statute did not entitle Thomas to benefits. Alito called this result "absurd" and overrode the objections of several of his colleagues and convinced the full 3rd Circuit to overturn the lower court decision.

Alito's passion didn't move the Supreme Court, however, which overturned his decision in 2003. In a pointed rejection of Alito's opinion—accusing him of "disregarding" basic grammatical rules for interpreting the law—the Supreme Court fell back on the narrow and technical reading and denied Thomas her Social Security benefits. The author of this stinging rebuke to Alito? Justice Antonin Scalia.

Nevertheless, as an appeals court judge, Alito has had a strong conservative record. Perhaps his most famous case came only a year into his judgeship, in 1991, when he dissented from a decision by his fellow appeals court judges striking down a Pennsylvania law that required women to inform their husbands before obtaining an abortion. In 1996, he dissented from a decision broadening the rights of workers suing over sex discrimination. A year later, he upheld the display of a Nativity scene in front of city hall in Jersey City, N.J. because it was multi-denominational, including not only a creche and a menorah, but also Frosty the Snowman. On the bench, Alito is known to be unfailingly polite, but pointed in his questioning.

Alito's 15 years on the bench have been smooth, with one exception. In 2003, he was accused of conflict of interest after he dismissed a lawsuit against the Vanguard mutual fund. It emerged after the decision that he had a substantial amount invested in Vanguard. He denied any wrongdoing, though he immediately removed himself from the case when the plaintiff requested a new hearing.

Clerks and associates who have worked with him paint a picture of a polite, modest, quietly humorous man who enjoys baseball—he's a Phillies fan—and who enjoys exploring the ethnic restaurants that surround his office in Newark. They say he is hard-working, but makes a point of being home with his family as often as possible. In 1987, he became the U.S. Attorney for New Jersey, where he earned a powerful friend—Michael Chertoff, then his deputy and now the Director of Homeland Security. When Alito was nominated to the appeals court, he pressed for Chertoff to succeed him as U.S. Attorney, helping him to rise above other candidates for the job.

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Alito on the Issues

Two former clerks on how Bush's Supreme Court nominee thinks

By SEAN SCULLY/PHILADELPHIA

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Posted Tuesday, Nov. 01, 2005

Michael Stein, a visiting professor of law at Harvard and self-described "left-winger" was a clerk for Samuel Alito in 1991 when the appeals court judge was considering Planned Parenthood of Southeastern Pennsylvania v. Casey. That case, involving Pennsylvania laws that placed obstacles in the way of women seeking an abortion, would eventually be addressed in a controversial 5-4 Supreme Court decision that essentially upheld Roe v. Wade. Though the Court agreed with Alito and the other two judges from the Third Circuit Court of Appeals, there was one key difference. Alito argued for upholding a law requiring married women to notify their husbands before getting an abortion, a decision that's getting a lot of scrutiny now as people search for clues as to how Alito might rule on the issue as a Supreme Court Justice.

Stein says Alito handled all the research on the case himself, which wasn't unusual for the hands-on judge, but he did not discuss the matter with his clerks or ask them for their own research, which was. "I think that was motivated by a concern to shield his clerks from any potential fallout" from the incendiary case, Stein says. "I had no idea of the result until the decision came out."

Alito's opinion in the Casey case was not a clear endorsement of the Pennsylvania law. Instead, Alito argued that the evidence before the court did not unequivocally show that the law would be "unduly burdensome" on married women and, until such evidence was presented, the court should not substitute its judgment for the legislature's. Stein says that view is typical of the way Alito views the role of the courts. There is a school of thought that "presumes that the branches are separate and presumes that Congress or the state legislature [have] done their work and knows what they're doing and why they're doing things, and unless it fails for Constitutional muster that their fact gathering and research has

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been sufficient," he says. "That's what we consider 'judicial restraint.' Judge Alito believes in judicial restraint."

Stein points out that Alito was also on the panel of the 3rd Circuit that struck down New Jersey's Partial Birth Abortion ban in 2000, suggesting he is not a reflexive supporter of abortion restrictions.

"In working with him for over a year," says Stein, "it was very clear that in engaging cases he wouldn't start with the result and work his way backwards. He was always extremely methodical and reflective. He looked at the question; he researched by himself areas he was uncertain about. He sat and he thought a good deal about the arguments made by both sides, then he came to a tentative conclusion that he would perhaps probe a bit in oral arguments. And I think that's exactly what you want from a judge—someone who hasn't made up his mind before he sits down to read and see what the parties are arguing."

Stein says it was always obvious that the president would nominate a conservative. There are three basic types of persons he could have nominated—a "stealth candidate," such as Harriet Miers, who has little record; a thoughtful and open-minded conservative; or a doctrinaire or "instrumental" conservative who has an agenda to enact. "We are going to have a conservative on the court—that's a given—so between those three choices I would much prefer having someone who is intelligent, open minded and doesn't approach things knowing the result they want to come away with." Concludes Stein: "If the President has to appoint a conservative to the Supreme Court, which is his right, I would want it to be someone like [Alito]."

Nora Demleitner, who clerked for Alito from 1992 to 1993 and is now a law professor at Hofstra, recalls an "incredibly tolerant" judge. "He doesn't have this narrow, set view of the law." The only time she ever saw Alito upset or angry, she says, was when he thought a lawyer was misrepresenting the facts of a case. "He has no patience with lawyers when the record doesn't reflect the argument they make. He has no patience for people trying to pull a fast one."

In 1993, Alito considered the case of an Iranian woman who was seeking political asylum, saying she would be persecuted because of her feminist views in the conservative, theocratic Muslim country. Says Demleitner: "He struggled with the case. 'I think he had incredible compassion for [the woman]. He didn't want to see her deported back to Iran and he had no patience with the Immigration Services, which bungled the case.'" Alito wrote a widely cited opinion affirming that feminist opinions do constitute political statements and therefore women should be entitled to asylum if they fear persecution based on such beliefs.

However, even though Alito supported the general idea that feminist thought could be a basis for seeking political asylum, he denied the woman's request to stay in the U.S., ruling she had not made the case that she specifically would be singled out by Iranian authorities, one of the keys to an asylum request. Says

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Demleitner: "It showed to me his incredible compassion but his effort to issue a fair opinion within the law [that he had to work with]."

While his decision may seem contradictory, his clerks say, it actually illustrates Alito's style. He is willing to look at the law in ways that help protect people, but he is ever mindful of the specifics of a case. The woman won in philosophy—that feminists are entitled to protection—but lost on the facts because she failed to prove to Alito that she herself was such a feminist in danger of persecution.

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