

Samuel Alito

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ABSTRACT (ABSTRACT)

Judge [Samuel Alito] is most often compared to Antonin Scalia. Years ago one journalist even dubbed him "Scalito," and the name stuck. While the two share an ethnic heritage and a constitutionalist judicial philosophy, it would be easy to overstate the comparison. Judge Alito's opinions are rarely adorned with zingers or verbal barbs at his colleagues. What he may lack in rhetorical flair, however, he more than makes up for with analytical rigor. Whereas Justice Scalia's caustic wit and penchant for tweaking his colleagues (particularly Justice O'[Connor]) might have cost him in building court majorities, Judge Alito's subtle charm and cooler approach could make him a powerful intellectual force on the court.

Placing Judge Alito's [Casey] dissent in the context of his other abortion-related decisions further demonstrates his commitment to law over predetermined policy outcomes. In *Planned Parenthood v. Farmer* (2000), he joined the court in striking down New Jersey's ban on partial-birth abortion as inconsistent with prevailing Supreme Court precedent. Five years earlier, he joined a majority opinion that deferred to an executive branch agency's interpretations of federal law, even though doing so meant blocking a state from limiting government funding of abortions. In short, his record is neither that of a "pro-life" or "pro-choice" judge, but of a "pro-law" judge.

FULL TEXT

With the nomination of Samuel Alito to replace Sandra Day O'Connor, President Bush has returned to the approach that served him so well when he nominated John Roberts to the Supreme Court -- that of picking the best available candidate irrespective of diversity concerns. Judge Alito's credentials are more like those we have come to expect from Supreme Court nominees, including an Ivy League education and substantial judicial experience -- more than any Supreme Court nominee since before World War II. Yet he also has significant executive branch and prosecutorial experience that could add a unique perspective to the court.

There is nothing "stealth" about this choice, no need to fight over documents or trust that the president knows Judge Alito's "heart," for a brilliant judicial mind is clearly on display in his public record. Over the past 15 years he has shown himself as a thoughtful, serious conservative with impressive intellectual chops. This is not meant to denigrate the accomplishments or integrity of Ms. Miers, an accomplished attorney who has dedicated much of her life to public service. Indeed, it is to Ms. Miers's profound credit that after her withdrawal, she immediately turned to helping pick the next nominee.

Judge Alito is a supremely qualified nominee who should (though he may not) win a quick and easy confirmation. Some Senate Democrats will find reasons to oppose him, but he once held their support. He was confirmed unanimously by a Democratic Senate in 1990 only two months after he was first nominated by George H.W. Bush.

There being no question about Judge Alito's accomplishments and credentials, the debate over this nomination will focus squarely on his jurisprudence. Already at least one Democratic aide reportedly called Judge Alito a "right-wing wacko." Such epithets grossly distort his record. He is not a dogmatic conservative; his record shows a man

more interested in getting the law right and faithfully applying applicable precedents than scoring rhetorical points or advancing an ideological agenda. As he commented in an interview earlier this year, "Judges should be judges. They shouldn't be legislators, they shouldn't be administrators."

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A Justice Alito may vote with Justice Scalia on many issues, but they would hardly march in lockstep – and when they disagree we would be treated to an intellectual debate of the highest order. One area we may expect to see differences between the two is on the First Amendment. Judge Alito's record suggests that he is more sympathetic to religious liberty claims, and more willing to hold that purportedly neutral government regulations unnecessarily impede upon the right to live in accord with one's religious ideals. He has ruled favorably in challenges by Muslims and Native Americans who argued that local laws impermissibly burdened the exercise of their faiths. There are also indications a Justice Alito could take a more expansive view of constitutional protection for free speech, including religious expression. In several cases he has voted to protect public school students' rights to express their own religious views.

Judge Alito's most controversial opinion may be his partial dissent in *Planned Parenthood v. Casey*, in which he voted to uphold the constitutionality of a spousal notification requirement for abortions. The three-judge panel in *Casey* unanimously upheld several abortion restrictions adopted by the Pennsylvania Legislature, including a parental-notification requirement and a 24-hour waiting period before a woman could obtain an abortion. While both policies may restrict the availability of abortion, neither constituted an "undue burden" on a woman's right to abort her fetus, as the Supreme Court subsequently held. Where Judge Alito differed with his colleagues was on whether it was an "undue burden" to require married women to notify their husbands prior to obtaining an abortion. This requirement was subject to several exceptions and was easily circumvented.

After a careful reading of the available Supreme Court precedent, Judge Alito concluded that this spousal notification was a constitutionally permissible limitation on a woman's right to an abortion. His opinion gives no hint as to whether he would personally support spousal notification, or other regulations. This is not a judge's role, he explained: "Whether the legislature's approach represents sound public policy is not a question for us to decide. Our task here is simply to decide whether [the law] meets constitutional standards." This is the hallmark of judicial restraint.

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It is often said that judicial appointments are perhaps the most important part of a president's legacy. If so, this part of the Bush legacy should be secure. In nominating Chief Justice Roberts and now Judge Alito, President

Bush has nominated two jurists with powerful intellects who could shape the law for years to come.

We may not all agree with all of their decisions, but we will respect their judgment, appreciate their analyses, and admire their commitment to the law. As a law professor, I look forward to the opportunity to study Justice Alito's future opinions with my students, as I am confident a Justice Alito would contribute well to a Supreme Court of which we can all be proud.

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