A summary of media-related decisions by Supreme Court nominee Samuel A. Alito Jr.

Prepared by The Reporters Committee for Freedom of the Press

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Unlike the two other nominees introduced to the public this year, Supreme Court nominee Samuel Alito has a long paper trail of appellate decisions on constitutional law and other legal issues, due to his 15 years on the U.S. Court of Appeals for the Third Circuit. While the Senate and the public will debate his political leanings, a review of his First Amendment jurisprudence by The Reporters Committee for Freedom of the Press reveals a strong tendency to side with those arguing free speech cases — with the possible exception of federal prisoners.

As discussed below, Alito has recognized that laws restricting advertising income or imposing financial burdens on speakers or the news media interfere with First Amendment rights, even if they don't ban the speech outright. He also has shown a willingness to stop government action done in retaliation for speaking out, which is certainly good news for whistleblowers. He has demonstrated an understanding of the importance of the "actual malice" standard in affording the news media protection from libel suits, assuring the breathing room necessary to guarantee a free press. And in determining how to apply the reporter's privilege against compelled disclosure of sources to individuals claiming to be journalists, he joined in a decision adopting a test that gives freelancers and other nontraditional journalists the protection of the First Amendment — even though the litigant in that case, who ran a hotline for wrestling fans, did not meet the definition of a journalist.

But the news is not all good. Alito has not had a decision clearly upholding the public's right to keep its government in check through the Freedom of Information Act, and his one opinion in the area — which is somewhat consistent with his previous actions as a government attorney — was a dissent that upheld the privacy interests of individuals in keeping information from the public. He also upheld the dismissal of a case that argued the government had committed fraud in a 1953 case in which the U.S. Supreme Court established the "state secrets" privilege based on false allegations by government witnesses.

This summary is presented to allow journalists to review the Alito record themselves.

Prior Restraints

Alito wrote a unanimous decision in ***Pitt News v. Pappert***, finding a Pennsylvania state law that banned alcohol ads in student newspapers unconstitutional.

The appeals court concluded that the statutory provision, which prevented student newspapers from receiving remuneration for printing alcohol ads, was unconstitutional because it impermissibly restrained commercial speech and it imposed a financial burden on a narrow

segment of the media.

Rejecting the state's claim that the provision's prohibition on receiving money in exchange for ads does not prevent the paper from printing alcohol ads, the court explained that the purpose of the provision was to discourage speech that the government regarded as harmful.

"Imposing a financial burden on a speaker based on the content of the speaker's expression is a content-based restriction of expression and must be analyzed as such," Alito wrote. The provision imposed "'a financial disincentive' on certain speech by *The Pitt News* (alcoholic beverage ads) because would-be advertisers cannot pay the paper to run such ads."

Applying the standard for commercial speech bans, the Court held that the statutory provision violated the First Amendment. Pennsylvania could not show that the provision was necessary to achieve "an overriding government interest" and an "interest of compelling importance." The state produced no evidence showing that the provision, eliminating ads in a small media market, combated underage or abusive drinking to a material degree. The provision did not prevent other newspapers, television channels or radio stations from advertising alcohol nor did it impair underage students' abilities to find places to purchase alcohol near or on campus.

In any event, Alito noted, the ban was not narrowly tailored to meet the government's stated objective of reducing underage or abusive drinking. As written, the provision prevented the university population over the age of 21 from getting information about alcohol products, and the government could use other, more direct ways to target underage drinking such as alcohol beverage control laws.

The court concluded that the provision also violated the First Amendment because it unjustifiably imposed a financial burden on a segment of the media. Courts must be wary of financial restrictions on the press, Alito explained, because, if unchecked, "Government can attempt to cow the media in general by singling it out for special financial burdens. Government can also seek to control, weaken, or destroy a disfavored segment of the media by targeting that segment."

The Pitt News, an independent student newspaper, filed suit after the law was enacted, but a federal district court dismissed the claim, holding that the law "has no effect on The Pitt News' freedom of expression" because the paper was not prevented from speaking about alcoholic beverages as long as it was not paid for engaging in the expression. On appeal, the Third Circuit rejected the district court's decision and remanded the case for further proceedings.

In ***Swartzwelder v. McNeilly***, Alito affirmed a U.S. District Court's order that granted a preliminary injunction against the enforcement of a police office order and memo requiring bureau employees to obtain clearance before giving expert testimony. On referral from the district court, a magistrate judge had concluded that the plaintiff police officer, Robert Swartzwelder, was likely to succeed in showing that the order, Order 53-7, and a memo about the order, violated his first amendment right to free speech because they were overly broad and the police bureau's interests could be protected by more narrowly drawn provisions.

Swartzwelder, a police officer who trained employees about the use of appropriate force in their duties, was commonly subpoenaed to provide expert testimony on that subject. After Order 53-7 was adopted, Swartzwelder requested permission to testify as a defense expert in a

case involving a police officer's alleged use of excessive force. The chief of police responded in a memo directing Swartzwelder to submit his testimony to a city official prior to testifying "to determine its validity." Swartzwelder then filed his First Amendment claim, arguing that the order and memo violated his speech rights, and sought a preliminary injunction.

On appeal, the Third Circuit rejected the city's arguments that the lower court applied the wrong legal standard in granting the preliminary injunction and, even if it had used the correct standard, had misapplied that standard. Alito determined that, since Order 53-7 restricts employee speech before it occurs rather than penalizing employee speech after the fact, the magistrate judge properly treated it as a prior restraint on employee speech.

Further, Alito explained that the magistrate judge did not abuse his discretion in finding that as a regulation affecting speech that is a matter of public concern — judicial testimony — Order 53-7 had to be narrowly tailored to protect the public interest in that speech, yet failed to do so. The appellate court held that while the city asserted many legitimate interests, the regulation was overly broad; it was poorly tailored for keeping track of testifying employees' locations since it applied only to employees giving opinion, not fact, testimony. While disrupting the work place and preventing friction among colleagues are important concerns, Order 53-7 does not apply to fact testimony, which could also present a danger of disruption. Moreover, the standard for granting approval is whether the testimony would be "valid," not whether it would cause a disruption.

Alito joined the unanimous panel in ***Abu-Jamal v. Price*** in 1998, overturning restrictions that kept convicted inmate Mumia Abu-Jamal from being paid for articles and commentaries about life in prison. The rules forbade prisoners from running businesses and making income from certain activities, and the court noted that to the extent they interfered with constitutional rights they could only survive scrutiny if they were directly related to legitimate penological interests and there were no less-restrictive alternatives. The panel ruled that the restrictions on Abu-Jamal, whose status as a death-row inmate had attracted widespread public attention particularly after his commentaries appeared on National Public Radio, could not pass that test, and were therefore unconstitutional as applied to him.

Alito joined a panel opinion striking down a broad prior restraint brought as punishment in a libel case in ***Kramer v. Thompson*** in 1991. An attorney, Stephen Kramer, brought a libel action against his former client, Richard Thompson, who had repeatedly made and spread disparaging remarks about Kramer. A trial court found for Kramer and, after repeated failures by Thompson to amend his libelous behavior, ordered a prior restraint on any additional libelous speech by Thompson. The Third Circuit ruled that since the Pennsylvania Supreme Court had made strong statements against prior restraint orders, that the district court was not justified in ordering a prior restraint against Thompson.

Secret Courts

Alito joined in a unanimous 2005 Third Circuit decision in ***Herring v. U.S.***, a

controversial case over the state secrets privilege.

In a 1953 case, *Reynolds v. U.S.,* the U.S. Supreme Court created the state secrets privilege, finding that litigation over an air crash could not go forward because it would require the revelation of state secrets. The government therefore was able to withhold the air crash records for national security reasons. But years later, declassified records showed that there was a cover-up of negligence, and that the original records would not have revealed any secrets. A widow of a pilot killed in the crash tried to revive the suit, but the appellate panel refused to find a fraud upon the court, which would have been necessary to overturn the original decision, saying there is an "obviously reasonable" truthful interpretation of statements made by the Air Force in the 1953 lawsuit.

The appellate panel on Sept. 22, 2005, noted that there is a "necessarily demanding" standard for proof of fraud on the court: It must be intentional; by an officer of the court; directed at the court itself; and in fact deceptive to the court. Mere perjury by the government would not be enough to prove fraud on the court, the panel ruled. If information actually revealed sensitive information about the mission and the equipment involved, the privilege could apply. In the *Reynolds* case, because there is an "obviously reasonable truthful interpretation" of the statements made by the Air Force, the court refused to find fraud.

Alito joined a unanimous panel decision in ***Shingara v. Skiles***, in which the Third Circuit earlier this year overturned a district court's protective order which sought to prevent further disclosure of discovery documents by the plaintiff to the news media. The plaintiff, a police officer who sued over alleged retaliation for his complaints that radar detectors used by the city police department were faulty, disclosed reports on the faulty detectors to the media. Philadelphia Newspapers Inc. sued to vacate the protective order. The court applied a balancing test between the interests of the public and the interests of the parties to the lawsuit. It found the protective order to be overbroad and without merit and overturned the district court's order.

Libel

Alito wrote for a split panel in 2001 in a libel case that required a close look at the evidence necessary to establish "actual malice" — knowledge of falsity or reckless disregard for the truth. The panel in ***Tucker v. Fischbein*** did find as an initial matter that articles in *Time* and *Newsweek* were potentially defamatory, but upheld the dismissal of the claims against the magazines because of the lack of actual malice.

C. Delores Tucker, an anti-"gangster rap" activist, sued *Time*, *Newsweek* and their reporters for an article suggesting that a claim in her husband's lawsuit against rapper Tupac Shakur was based on damage to the couple's sex life. The Third Circuit, in a split decision, overruled the district court by finding that the comments in the articles were capable of having a defamatory meaning. "Because of the inherent implausibility of the idea that lyrics alone could cause millions of dollars of damage to a couple's sexual relationship, the statements were capable of making the Tuckers look insincere, excessively litigious, avaricious, and perhaps unstable," Alito wrote. He wrote that he read the statements at issue in context and looked "at the

impression that they were likely to engender in the minds of the average reader . . . ."

However, the court agreed with the district court when it found that there was no clear and convincing evidence of actual malice against *Newsweek* or *Time* — even though there was evidence the *Time* reporter departed from professional standards by ignoring the press release issued by the Tuckers which attempted to explain their lawsuit. The Third Circuit found that the Tuckers had presented no evidence that showed any actual malice on behalf of *Time*.

But Alito found there was enough evidence to survive summary judgment — dismissal of the case — with regard to Richard Fischbein, the lawyer representing Shakur's estate because he should have known of the alleged defamatory nature of the statements before subsequent articles were published.

Alito joined a panel decision in ***Franklin Prescriptions v. New York Times*** that avoided a tricky libel issue by dismissing for procedural reasons.

Franklin Prescriptions sued over a Oct. 25, 2000, *New York Times* article that discussed the dangers of buying prescription drugs online. The company was not mentioned in the article but the graphic accompanying the story depicted Franklin Prescription's Web site. The company sued for defamation. The jury returned a verdict in favor of Franklin Prescriptions, but awarded no damages because it found the company suffered no damages. Franklin appealed, contending the court erred by not instructing the jury to consider presumed damages. The Third Circuit avoided interpreting the murky Pennsylvania law — Pennsylvania has conflicting decisions on the availability of presumed damages when the plaintiff has proved actual malice — by finding that Franklin Prescriptions did not file a timely objection.

In ***Botts v. New York Times***, Alito joined a panel decision dismissing a libel claim. The Botts family sued *The New York Times* and the United Negro College Fund over an advertisement depicting a fictional African-American named "Larry Botts" who had drunk too much alcohol and wasted his mind, in a campaign to encourage teenagers to go to college. The Botts family members, who are white, claimed that the advertisement defamed them. The Third Circuit upheld the dismissal and found no defamation in the advertisement.

Privacy

In ***McFarland v. Miller***, Alito joined the unanimous panel decision upholding a "right of publicity" claim in 1994. The personal representative of the estate of George "Spanky" McFarland, a former child actor of "Our Gang" and "Little Rascals" fame, sued a restaurant for, among other claims, invasion of privacy because the restaurant had the identical name of the movie character played by the actor and used images of McFarland as he appeared in his "Our Gang" days. The Third Circuit found that "a celebrity's legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes." However, the court dismissed the invasion of privacy claim, finding that his claims of deprivation of property and lost earnings fell under his right of publicity claim. The court then found that McFarland had not presented enough evidence to prove any other part of the claim — humiliation, embarrassment,

or mental distress.

Reporter's privilege

Alito joined a unanimous panel in a 1998 case that applied a test to determine who qualifies for a First Amendment-based reporter's privilege that is generally accepted as a positive rule by media lawyers. The court did, however, overturn the lower court's determination that the privilege should apply.

In ***In re Madden***, the panel overturned a district court decision that Mark Madden, who was not a party in a civil case between wrestling promoters, was entitled to claim a journalist's privilege. Madden produced tape-recorded commentaries on World Championship Wrestling (WCW) events and wrestlers for a 900-number hotline. The Third Circuit found that the privilege "is only available to persons whose purposes are those traditionally inherent to the press; persons gathering news for publication." It ruled that although Madden sought and received information for dissemination to the public, the test to determine who is a journalist under the privilege requires more.

The court followed the Second Circuit's *von Bulow v. von Bulow* decision, which recognizes a qualified reporter's privilege under the First Amendment. The test requires that the individual, at the start of the newsgathering process, must have the intention of disseminating the information to the public, and must be involved in activities traditionally associated with gathering and disseminating the news. The court found the reasoning of *von Bulow* to "be persuasive." In Madden's case, the court found that since he was, by his own admission, more of an entertainer than a reporter and because he received all of his information from the WCW, he did not fit the definition of a journalist and his source could not be protected by the privilege.

Freedom of Information

Judge Alito dissented in a 1992 Freedom of Information Act decision that granted employee home addresses to the Federal Labor Relations authority for use in collective bargaining, but the U.S. Supreme Court ultimately ruled in 1994, in a similar case from the Fifth Circuit, that disclosure of the home addresses would intrude upon the employees' personal privacy interests. In his dissent in ***Federal Labor Relations Authority v. Department of the Navy***, Alito wrote, "It seems clear to me that all federal employees — from Cabinet officers to GS1's — have a privacy interest of *some* weight in their home addresses and that there is no public interest cognizable under FOIA in the disclosure of these addresses." The privacy exemptions to the FOI Act allow information to be withheld if the intrusions on personal privacy outweigh the public's interest in disclosure. In 1989 the U.S. Supreme Court ruled in a case involving criminal history rap sheets that the only public interest that could be considered in the balance is the public's interest in knowing "what the government is up to." Prior to that 1989 ruling in *Department of Justice v. Reporters Committee*, federal courts had held that the public's interest in the promotion of collective bargaining outweighed any privacy interest in keeping

employees' names and addresses from their bargaining representative.

In ***Maydak v. U.S. Dep't of Education***, Kenneth Maydak filed several Freedom of Information Act requests from Canada, where he had fled after violating conditions of his supervised release following an arrest. His FOI Act suit was dismissed under the discretionary Fugitive Disentitlement Doctrine in the U.S. District Court for the Western District of Pennsylvania and the Third Circuit, Alito concurring, unanimously affirmed its dismissal, holding that the doctrine was not improperly applied. The court left open the question of whether Maydak could properly bring suit in the District Court for the District of Columbia.

In ***Pansy v. Borough of Stroudsburg***, Alito concurred in a Third Circuit decision to allow Ottaway Newspapers, Inc., *The Pocano Record* and the Pennsylvania Newspaper Publishers Association to intervene in an action to gain access to a settlement agreement between a city and its former police chief in their civil rights suit. The district court had determined the settlement agreement to be confidential, and because the agreement was never filed in the court, also dismissed the newspapers' claim to access as a judicial record under the right of access doctrine.

The Third Circuit discussed freedom of information, stating that "This case thus illustrates how confidentiality orders can frustrate, if not render useless, federal and state freedom of information laws," also noting that the newspapers went had to "endure considerable time and expense" in attempts to access the settlement agreement which would have likely been available under the applicable freedom of information law, but for the district court's confidentiality order. The panel remanded the case to the district court to determine whether the order of confidentiality was justified.

Alito wrote the Third Circuit opinion in the whistleblower case of ***Mitchum v. Hurt*** in 1995, which held that current and former employees of the Veterans Administration Medical Center alleging retaliation in violation of their First Amendment rights were entitled to bring lawsuits for injunctive and declaratory relief, but not money damages. The Third Circuit reversed the U.S. District Court for the Western District of Pennsylvania which had held that the whistleblowers were required to pursue available administrative remedies prior to filing suit.

Alito's other cases involving FOI Act or records access issues came when he was at the Justice Department from 1981 to 1987, or served as U.S. Attorney in New Jersey from 1987 to 1990.

Alito argued on behalf of the National Archives in ***Public Citizen v. Burke*** that records of Richard Nixon's presidency should remain unavailable to the public, citing Nixon's claim of executive privilege under the Presidential Recordings and Materials Preservation Act. The Reporters Committee for Freedom of the Press joined Public Citizen in challenging that interpretation of the regulation and the U.S. District Court in Washington, D.C., held that the regulations cannot require the archivist to acquiesce to a former president's assertion of the executive privilege. The U.S. Court of Appeals for the D.C. Circuit upheld the decision in 1988.

In ***Patterson v. F.B.I.***, Alito successfully argued in U.S. District Court in New Jersey in 1989 that FOI Act Exemption 1 (national security) precluded a 12-year-old plaintiff from

receiving access to files the FBI was keeping on him related to an independent research project he was conducting. Todd Patterson had engaged in an information gathering campaign to compile his own encyclopedia by writing letters around the world soliciting data. The FBI began monitoring Patterson's activities and when Patterson was denied a copy of his personal file under the FOI Act, he sued the FBI for violations of the FOI Act and the Privacy Act. The court held that Exemption 1 of the FOI Act was properly applied and that the FBI records were relevant to authorized law enforcement activity and keeping them did not violate the Privacy Act.

While working for Justice, Alito successfully argued in ***U.S. v. Weber Aircraft*** that records related to an Air Force safety investigation were protected from disclosure under Exemption 5 of the FOI Act (intra-agency memorandums or letters). Weber Aircraft had sued for access to the records in the U.S. District Court for the Central District of California which held that the records were protected from disclosure under the Act. The Court of Appeals for the Ninth Circuit reversed the lower court, but the U.S. Supreme Court ultimately held that the exemption applied because the records were privileged attorney work product.

Alito successfully argued to the U.S. Supreme Court in ***Federal Trade Commission v. Grolier, Inc.***, that FOI Act Exemption 5 (intra-agency memorandums or letters) applied to FTC investigation materials requested by Grolier regarding one of its subsidiaries. The U.S. District Court in Washington, D.C., found the materials exempt from disclosure, but on appeal, the Court of Appeals for the D.C. Circuit held that some of the documents could not be withheld. The high court reversed, holding that the FTC materials constituted attorney work-product and exempt.

Broadcasting

In ***F.C.C. v. League of Women Voters of California***, Alito, while working for the Solicitor General's office in 1984, argued before the Supreme Court on behalf of the government that Section 399 of the Communications Act was constitutional. The section provided that "no noncommercial educational broadcasting station which receives a grant from the Corporation for Public Broadcasting . . . may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for public office." Alito argued that Congress may, consistent with the First Amendment, "restrict the ability of all broadcasters, both commercial and noncommercial, to editorialize." This argument was rejected by the Court.

Other First Amendment issues

While this report primarily focuses on issues of concern to the news media, other cases involving First Amendment claims can shed light on how Alito will rule in such cases.

Religious freedom: In two free exercise cases, Alito found that the plaintiffs' First Amendment rights had been violated. In ***Fraternal Order of Police v. Newark***, a police department had violated the free exercise clause when it refused religious exemptions from its prohibition against officers wearing beards, while allowing medical exemptions from the same

prohibition. In ***Blackhawk v. Pennsylvania***, a Pennsylvania statute violated the free exercise rights of a Native American who owned black bears that he used in religious ceremonies when he was refused a fee waiver for a permit to keep wildlife in captivity, even though waivers were granted for secular reasons.

Alito found no violation in two Establishment Clause cases. In ***ACLU of N.J. ex rel Lander v. Schundler***, a town's holiday display that included both secular symbols and symbols from many different religions was constitutionally sound because it did not endorse a particular religion, but instead expressed the freedom to choose one's own beliefs. In ***Child Evangelism Fellowship of N.J. v. Stafford Township School Dist.***, a school had conducted unlawful viewpoint discrimination by refusing to let a religious organization distribute private, non-school sponsored speech on a bulletin board and at a back-to-school night. There would be no Establishment Clause violation, Alito explained, in allowing the organization, through faculty, to distribute informational materials.

In ***ACLU of N.J. v. Township of Wall***, Alito avoided addressing the merits of the religion claim, concluding that the plaintiffs had no standing to challenge a township's religious display because they could not show they had been harmed by it. Many such cases are brought by individuals arguing that as taxpayers they are affected by how their money is spent, but in this case the display had been donated.

Retaliation/discrimination: In ***Azzaro v. County of Allegheny***, Alito joined in a concurring opinion reinstating a claim over retaliation for speech. A public employee sued after she was fired for reporting a sexual harassment claim. Alito agreed with the decision to reinstate her claim, but joined the concurring opinion to note the court "has not created anything close to a per se rule under which reports of sexual harassment will always constitute public concern speech," for which public employees can be protected from retaliation.

Freedom of association: In ***In re Asbestos School Litigation***, a complicated asbestos case before the Third Circuit in which Alito wrote for the panel, the court found that Pfizer Inc. could not be held liable as a conspirator to continue installing asbestos after its dangers were known, just because it belonged to an industry group that may have known of the dangers. Pfizer avoided liability because, among other reasons, the Third Circuit found that holding Pfizer liable for its association would limit speech. "Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection," Alito wrote. The court also found that the First Amendment issues were substantial enough to justify seeking review by the appellate court before a final order of the lower court.

Prisoners: Alito has shown a tendency to reject First Amendment claims brought by prisoners, with the Mumia Abu-Jamal case discussed previously a notable exception.

In ***Fraise v. Terhune***, Alito wrote for a divided panel in upholding a prison rule that restricts "security threat groups," primarily gangs. A group of prisoners sued, saying the rule interfered with their ability to practice their religion, an offshoot of the Nation of Islam. Alito found that the rule served valid penological interests, did not single out religious groups, and

allowed for alternative ways for affected religious groups to practice their faith.

In ***Waterman v. Farmer***, Alito wrote for a unanimous panel that upheld the constitutionality of a state law banning sex-offender prisoners' access to pornography in 1999. Prison officials had said the law interfered with their ability to control such prisoners, and a federal court found the law was unconstitutional because it was not related to any valid penological interest. The appellate panel overturned the decision, finding that the state legislature should not be second-guessed, and that a lack of legislative history or testimony on the measure was irrelevant.

Case citations:

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