Review of Judge Samuel Alito’s Record in Worker Rights Cases

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Abstract
[Excerpt] This review includes decisions and dissents authored by Judge Alito in cases involving basic statues enacted by Congress to protect workers: the Fair Labor Standards Acts, the Occupational Safety and Health Act, the Coal Mine Health and Safety Act, the Family and Medical Leave Act, the National Labor Relations Act (and other labor relations laws), the Worker Adjustment and Restraining Notification Act, and the Employee Retirement Income Security Act. This review includes several decisions and dissents of concern in cases involving statues barring employment discrimination, such as Title VII of the Civil Rights Act and the Age Discrimination in Employment Act. This summary does not include decisions in which Judge Alito participated but did not author an opinion. It also does not include summary decisions issued without published opinions (either affirming agency decisions or granting petitions for review). This review includes information on the appointing president of participating judges.

Keywords
Judge Samuel Alito, workers’ rights, decisions, cases, opinions

Comments

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Review of Judge Samuel Alito’s Record in Worker Rights Cases
Prepared by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
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This review includes decisions and dissents authored by Judge Alito in cases involving basic statutes enacted by Congress to protect workers: the Fair Labor Standards Act, the Occupational Safety and Health Act, the Coal Mine Health and Safety Act, the Family and Medical Leave Act, the National Labor Relations Act (and other labor relations laws), the Worker Adjustment and Retraining Notification Act, and the Employee Retirement Income Security Act. This review includes several decisions and dissents of concern in cases involving statutes barring employment discrimination, such as Title VII of the Civil Rights Act and the Age Discrimination in Employment Act. This summary does not include decisions in which Judge Alito participated but did not author an opinion. It also does not include summary decisions issued without published opinions (either affirming agency decisions or granting petitions for review). This review includes information on the appointing president of participating judges.

The 25 opinions included in this review may be categorized as follows:

3 Number of cases in which Judge Alito authored a majority opinion that was favorable to workers or unions

9 Number of cases in which Judge Alito authored a majority opinion that was unfavorable to workers or unions

1 Number of cases in which Judge Alito authored a dissenting opinion that was favorable to workers or unions

7 Number of cases in which Judge Alito authored a dissenting opinion that was unfavorable to workers or unions

5 Number of cases in which Judge Alito’s opinion cannot be characterized as favorable or unfavorable (e.g., case decided on procedural grounds)

Fair Labor Standards Act

Denying Overtime to Newspaper Reporters. In Reich v. Gateway Press, 13 F.3d 685 (1994), Judge Alito authored a dissenting opinion in which he concluded that a group of newspaper reporters were not covered by the overtime compensation requirements of the Fair Labor Standards Act. The Secretary of Labor sued Gateway Press, a publisher of 19 community newspapers in the Pittsburgh suburbs, claiming that the company had violated minimum wage and overtime requirements with respect to

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1 Employment discrimination opinions are not included in this count because, as indicated, this review includes some, but not all, of Judge Alito’s employment discrimination rulings, which are voluminous.
reporters who routinely worked more than 40 hours a week. The issue in the case concerned a provision of the FLSA which exempts employees of a "small newspaper" (i.e., one within certain prescribed circulation limits). The majority opinion, by Judge Becker (Reagan appointee) and joined by Judge Nygaard (Reagan), held that, in computing circulation, "newspaper" meant any individual newspaper or any set of related newspapers that constituted an "enterprise" within the statute's definition of that term. A separate provision of the statute called for aggregation of gross sales among related businesses that constitute an "enterprise" for determining whether the business was engaged in commerce and within the FLSA's jurisdiction. The majority borrowed the "enterprise" concept from this provision and applied it in aggregating the circulation of affiliated newspapers, finding this approach to be most consistent with the statutory purpose. The majority found that Gateway maintained strict control over both the organization and content of each of the newspapers and made all employment related decisions, and therefore it constituted an enterprise. Judge Alito dissented, and would have denied the workers the protections of the Fair Labor Standards Act, arguing that neither the statute nor the legislative history supported the majority's opinion.

Finding FLSA Coverage for Foreign Seamen. In a pro-worker opinion, Cruz et al. v. Chesapeake Shipping et al., 932 F.2d 218 (1991), Judge Alito authored a dissenting opinion that disagreed with the majority's holding that the FLSA did not cover foreign seamen employed on reflagged ships operating outside the United States. (Refflagging is the temporary transfer of ownership of a foreign-owned ship to a United States corporation. In this case, the reflagging occurred to afford protection to Kuwaiti tankers under threat from Iran during the Iran-Iraq war). Judge Rosenn (Nixon appointee), writing for the court, held employment on a reflagged vessel was a unique situation and that the vessels were not "in commerce" as required by the FLSA because they lacked a sufficient "domestic nexus." Judge Cowen (Reagan appointee) concurred in the judgment but reasoned that under choice of law analysis from admiralty cases, foreign, and not United States, law governed the dispute. Judge Alito wrote a dissent, finding the statutory language ambiguous and finding that FLSA coverage was supported by the legislative history.

Bankruptcy-
Excusing Corporate Officers from Personal Liability for Unpaid Wages. In Belcufine v. Aloe, 112 F.3d 633 (1997), Alito authored a majority opinion that appeared to allow personal policy judgments -- in this case, concern about potential financial liability for corporate officers -- to override statutory language. This opinion stands in marked contrast to the literal approach Judge Alito typically takes in interpreting worker protection statutes. In Belcufine, Alito held that a Pennsylvania law holding corporate officers personally liable for unpaid wages and benefits was no longer applicable following the filing of a bankruptcy petition. In Alito's view, the corporate officers should not be held liable for wages because once a bankruptcy petition has been filed, they are no longer empowered to choose to divert the corporation's funds to pay accrued wages and benefits. Judge Greenberg (Reagan appointee) dissented, finding no statutory limit on the liability of corporate officers. Judge Greenberg observed that the majority
“apparently believes that practical consideration require it to reach its result,” because otherwise the liabilities for corporate officers in bankruptcy could be significant.

**Occupational Safety and Health Act**

**Vacating OSHA Citations for “Failure to Abate” Safety Violations.** In *Alden Leeds v. OSHA*, 298 F.3d 256 (2002), Alito authored a majority opinion, joined by Roth (Bush I) and Schwarzer (Ford), reversing OSHA's citation of a company for “failure to abate” workplace safety violations that were the subject of a previous citation. The company had been cited in 1993 for 13 specific instances of improper storage of chemicals. The facility was re-inspected in 1994. In 1995, OSHA cited the company for 33 additional instances of improper storage of chemicals. Alito concluded that the 1993 citations did not put the company on sufficient notice that the violations at issue concerned improper storage practices generally, and not just the 13 specific instances cited by OSHA. He therefore concluded that the requirements for a “failure to abate” violation had not been met.

**Mine Safety and Black Lung Benefits**

**Questioning MSHA Jurisdiction at a Coal Processing Plant.** *RNS Services, Inc. v. Secretary of Labor*, 115 F.3d 182 (1997). The Mine Safety and Health Administration (MSHA) cited an employer engaged in coal processing for violations of mine safety laws. The employer's jurisdictional challenges to the citations were rejected by the Mine Safety and Health Review Commission (MSHRC) and the Third Circuit majority. Alito dissented from an opinion by Judge Cowen and joined by Judge Greenberg (both Reagan appointees) holding that the coal processing site was a “mine” within the meaning of the Coal Mine Health and Safety Act (so that MSHA had jurisdiction over the site). In dissent, Alito questioned whether MSHA had jurisdiction over the facility, and argued for a narrower interpretation of the agency's authority - an interpretation that would deprive many workers of MSHA's protections. Judge Alito would have remanded the case back to the Review Commission for further consideration of whether it had jurisdiction over the site.

**Awarding Black Lung Benefits.** *Cort v. Director, Office of Workers Compensation Programs*, 996 F.2d 1549 (1993). Alito authored an opinion joined by Stapleton (Reagan) and Seitz (Johnson) awarding a miner black lung benefits and ruling that the ALJ had improperly allowed eligibility to be rebutted on grounds not provided for in the regulations.

**Longshore and Harbor Workers Compensation Act.** *Pennsylvania Tidewater Dock Co. v. DOL Office of Workers Compensation Programs*, 202 F.3d 656 (2000). Alito authored an opinion, joined by Judges Nygaard (Reagan) and Rosenn (Nixon), reversing the DOL Benefits Review Board's denial of “special-fund relief” to the company. Under the Longshore and Harbor Workers Compensation Act, employers who hire workers with permanent partial disabilities are responsible for the first 104 weeks of workers’ compensation; the remaining weeks come out of a special fund. The ALJ had awarded
the employer “special fund” benefits, but the Benefits Review Board disagreed. Alito held that “because a reasonable judge could conclude that [the worker] was suffering from a serious disability and that his workplace injuries merely pushed him over the edge into permanent total disability,” payment of his benefits from the special fund was appropriate.

**Plant Closings (Worker Adjustment and Retraining Notification Act)**

**Excusing Employers for Plant Closings Caused by Government Action.** *Hotel Employees and Restaurant Employees Int'l Union v. Elsinore Shore Associates*, 173 F.3d 175 (1998). The court majority, in an opinion by Scirica (Reagan appointee) and Sloviter (Carter appointee) affirmed the trial court’s decision that an employer was excused from giving 60 days notice of a business closing because of the occurrence of unforeseeable business circumstances. The casino was in declining financial condition, and after months of oversight, the Casino Control Commission ordered the casino to close. Alito wrote separately to emphasize his view that employers are not required to give notice under the WARN Act when the government, rather than the employer, orders the plant closing.

**National Labor Relations Act**

**Crediting Employer Defenses to Discrimination against Employees for Union Activity.** In *NLRB v. Alan Motor Lines Inc.*, 937 F.2d 887 (1991), Judge Alito authored a majority opinion joined by Judges Stapleton (Reagan appointee) and Cahn (Ford appointee sitting by designation) setting aside the NLRB’s decision. The question in the case was whether the employer had sufficiently made out a defense to a claim that it had discriminatorily failed to recall union supporters from layoff. Alito concluded that the NLRB’s decision should be set aside because it failed to resolve a tension between the Board’s conclusion that the employer had not proven its defense, and the ALJ’s decision, which had credited exonerating testimony by the employer. The NLRB did not overrule the ALJ’s credibility determination, but found that the official’s testimony was outweighed by other evidence of discriminatory motive. Alito wrote that the Board could have, on the basis of the record as a whole, overruled the ALJ’s crediting of the president, but opted not to.

**Overturning the Board’s Decision Upholding a Union Election.** In *Indiana Hospital, Inc. v. NLRB*, 10 F.3d 151 (1993), the National Labor Relations Board upheld a hearing officer’s recommendation dismissing objections to a union election. Judge Alito authored an opinion joined by Judges Scirica (Reagan appointee) and Aldisert (Johnson) granting the employer’s petition for review and remanding the case back to the NLRB. The issue in the case was the hearing officer’s decision to revoke subpoenas for the case-intake logs of the Region’s information officer. The employer claimed in its objections that the Board’s neutrality in the election had been compromised by advice given by NLRB information officers to employee-voters, and it wanted the logs to determine which NLRB agents the employees had spoken with. The NLRB upheld the revocation of the subpoenas on the basis that it did not “prejudice” the employer, because the
employer could have, but failed to, call as witnesses the employees the information officer allegedly spoke to. But Judge Alito found that the employer might have been prejudiced by the revocation, because it could have called the Board agents to testify or used the logs to help guide its examination of the employees. Observing that the Board's decision "stands or falls on its express findings or reasoning," Judge Alito, while acknowledging there might have been other grounds on which to uphold the revocation of the subpoenas, granted the employer's petition for review, and the case was remanded to the NLRB.

Remanding the NLRB's Finding that a Company was Liable as an Alter Ego.
In *Stardyne v. NLRB*, 41 F.3d 141 (1994), Judge Alito remained true to form, authoring an opinion, joined by Judges Stapleton (Reagan) and Lewis (Bush I) remanding a case to the Board because of a technical deficiency. The NLRB found that an employer was not a "single employer" of another company, but was liable as its alter ego. Alito found that the Board's alter ego doctrine was a legitimate exercise of the Board's statutory "gap-filling" authority, and said that courts should defer to the test because it is consistent with the policies of the Act. Alito further agreed with the Board that an intent to evade collective bargaining is not a necessary criterion for a finding of alter ego status. He also found that the record of the case substantially supported the Board's alter ego finding. But, Alito pointed to an earlier case, cited by the company, holding that the alter ego concept was a subset of the single employer concept. While "unsure why the alter ego should be regarded as a subset of the single employer doctrine," given that the doctrines facially possessed distinct and non-overlapping criteria, Alito observed that the Board had squarely held alter ego to be a subset of single employer, and therefore an employer could not be an alter ego but not a single employer. Alito remanded the case back to the Board for a further explanation of its decision.

Section 302 of the Labor Management Relations Act

Criminalizing "No Docking" Provisions in Collective Bargaining Agreements. *Caterpillar v. UAW*, 107 F.3d 1052 (1997), involved the legality of a longstanding and widespread practice of employers and unions negotiating "no docking" provisions in their collective bargaining agreements. These provisions allow employees to perform grievance handling and other collective bargaining functions on behalf of the bargaining unit while drawing their regular pay and benefits from their employer. The majority opinion upheld the legality of "no docking" provisions, and was authored by Judge Nygaard (Reagan appointee), and joined by eight other judges. Judges Mansmann and Greenberg (both Reagan appointees) wrote a dissent. Alito wrote a separate dissent, and concluded that the "no docking" arrangement was a violation of Section 302 of the Labor Management Relations Act, which criminalizes the payment of things of value by employers to labor organizations except "as compensation for, or by reason of, his service as an employee of such employer." While prefacing his opinion by stating, "If I were a legislator, I would not vote to criminalize" the kinds of paid-leave for grievance chairs at issue in this case, he nonetheless determined that the "plain meaning" of the statute did just that.
Labor Management Relations Act

In *Luden’s Inc. v. Local 6, BCTWU*, 28 F.3d 347 (1994), Judge Alito dissented from Judge Becker’s majority decision compelling arbitration of a grievance. The case concerned whether a dispute which arose after the termination of a contract could be deemed to have arisen under the old contract’s arbitration clause. The district court found the dispute was not arbitrable. Judge Becker’s opinion held that, by its conduct of continuing to honor its terms and to discuss and resolve disputes as if it were still in effect, and its failure to disavow the arbitration provision, the company had entered into an implied-in-fact contract containing the obligation to arbitrate disputes contained therein. Alito dissented, arguing that the company’s conduct standing alone did not amount to agreement to enter into an implied-in-fact contract and that what the majority had actually done was to create, by judicial fiat, a set of facts in which the courts will apply a contract – in other words, an implied-in-law contract.

In *Wheeler v. Graco Trucking*, 985 F.2d 108 (1993), Alito, writing for the unanimous majority, held (1) that an employee’s hybrid duty of fair representation-contract claim against his employer and union for an alleged failure to pay contractual wages was barred because he never filed a grievance over the matter; and (2) that Section 301 preempted claims under state wage collection laws.

Setting Aside Arbitration Award. *Exxon Shipping Co. v. Exxon Seamen’s Union*, 993 F.2d 357 (1993). Alito authored an opinion, joined by Judge Scirica (Reagan), setting aside an arbitration award as contrary to public policy. The award required the company to reinstate a boat helmsman terminated for a positive drug test after his ship ran aground. Judge Seitz dissented, saying that arbitration awards should be upheld unless it would amount to judicial condonation of illegal acts.

Labor Management Reporting and Disclosure Act

*Berardi v. Swanson Memorial Lodge No. 48 of the Fraternal Order of Police*, 920 F.2d 198 (1990). Alito authored a unanimous opinion reversing the District Court’s dismissal of plaintiff’s complaint against the union for lack of jurisdiction (union was not a “labor organization” within the meaning of the LMRDA.) In Alito’s view, the trial court dismissed on grounds not raised by the union, and the plaintiff was entitled to an opportunity to respond.

Federal Employee Unions’ Right to Information

In *Federal Labor Relations Authority v. Department of Navy*, 966 F.2d 747 (1992), the court, in an en banc opinion authored by Judge Mansmann (Reagan appointee), enforced a Federal Labor Relations Authority order requiring the Navy to disclose to the union the home addresses of employees within a particular bargaining unit represented by the union. Judge Alito dissented, joined by Judge Stapleton (Reagan), saying that the
employees have a privacy interest in their home addresses, and that there is no public interest cognizable under FOIA in the disclosure of these addresses. The Supreme Court subsequently ruled against disclosure in a different case, holding that the information was exempt from disclosure under FOIA. 510 U.S. 487 (1994).

**Labor Cases Involving Constitutional Issues**

**Union Security Clauses are not “State Action”**. In *White v. CWA*, 370 F.3d 346 (2004), Alito authored a unanimous opinion joined by Judges Ambro (Clinton appointee) and Chertoff (Bush II appointee) holding that a union’s conduct with respect to notification of *Beck* rights under a union security clause is not state action subject to Constitutional scrutiny because the clause is fundamentally part of a private agreement. Alito compared the union’s exclusive bargaining authority status to state-sponsored monopolies, whose contractual arrangements are not deemed state action.

**State Employee Rights under the Family and Medical Leave Act/Sovereign Immunity**. *Chittister v. Dep’t of Comm’y and Economic Dev.*, 226 F.3d 223 (2000), involved the question of whether Congress validly abrogated state Eleventh Amendment immunity in enacting the medical leave provisions of the Family and Medical Leave Act, such that state employees would be allowed to sue their state employers for violations of the law. Alito authored the majority opinion, finding that Congress had not overcome the state’s sovereign immunity, meaning that state employees could not sue their state employer to enforce their rights. Alito wrote that in order for Congress to validly protect state employees’ rights under the Fourteenth Amendment, there must be a connection between the discrimination problem Congress is trying to address, and the law it passes. In Alito’s view, the FMLA failed this test. Alito ruled that even if Congress had made findings that the FMLA was being adopted to address discrimination by the states, the FMLA was a disproportionate solution to the problem, because in his view, it did more than remedy discrimination – it created an entitlement to family and medical leave. The Supreme Court later decided otherwise with respect to the family leave provisions of the FMLA (*Nevada Dep’t of Human Resources v. Hibbs* – opinion by Chief Justice Rehnquist).

**Drug Testing/Union Authority to Consent**. In *Bolden v. SEPTA*, 953 F.2d 807 (1991), Alito wrote for a nearly unanimous en banc panel of the Court, largely upholding a former employee’s Fourth Amendment privacy claim against SEPTA, but also holding that a union can consent to searches that might otherwise be unlawful under the Fourth Amendment. Alito held that a union may, unless it violates an employee’s duty of fair representation, prospectively waive an employee’s privacy rights with respect to drug testing. Therefore, the plaintiff’s backpay in this case ended when the union settled his grievances by, in part, consenting prospectively to drug testing and agreeing that reinstatement of the plaintiff was conditioned on submission to a drug test. One judge (Nygaard – Reagan appointee) dissented.
ERISA Cases

**Upholding Employer Liability for Delinquent Contributions.** In *Sheet Metal Workers Local 19 et al. v. Keystone Heating*, 934 F.2d 35 (1991), Alito authored a unanimous opinion, joined by Judges Becker and Nygaard (Reagan appointees), holding that the district court properly granted summary judgment on the union’s claim that the employer remained a party to a contract despite being in breach for many years, and that the district court properly allowed the union to seek delinquent fund contributions even though its complaint only sought an audit of company records, because the pleadings alerted the employer that payment of overdue contributions would be sought. Alito also held that the district court erred in granting summary judgment on the claim for delinquent payments because Section 502(g)(2) of ERISA entitles the defendant employer to a jury trial, based on the ERISA section’s provision that authorizes courts to give “legal or equitable relief as the court deems appropriate,” given that past Supreme Court cases have held that use of the terms “legal relief” connotes the right to a jury trial.

**Finding State Law on Fringe Benefit Collection Preempted.** In *Bricklayers Local 33 Benefit Fund v. America’s Marble Source, Inc.*, 950 F.2d 114 (1991), Judge Alito authored a unanimous opinion, joined by Judges Mansmann and Diamond (by designation), holding that ERISA preempted a New Jersey statute (“Fringe Benefit Act”) providing that, where a contractor or subcontractor is delinquent on fringe benefit payments, a benefit fund may move for the suspension of payments by the owner of the project to the contractor or the subcontractor, and may have these payments instead diverted to make whole the benefit fund. Section 514(a) of ERISA preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” governed by ERISA. Alito found that most, if not all, fringe benefit funds covered by the state statute would be ERISA funds, and therefore the state law “related to” ERISA funds.

**Widow not Entitled to Additional Life Insurance Benefits under Employer’s Policy.** *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310 (1991). Alito authored a unanimous opinion, joined by Mansmann (Reagan appointee) and Garth (Nixon), holding that the widow of a former employee was not entitled to increased life insurance benefits, because the increase was adopted after her husband was no longer “actively at work”, as required by the policy. Alito rejected the argument that a company brochure, which did not contain the “actively at work” requirement, constituted a Summary Plan Description or that it entitled the widow to the benefits.

**Employee not Entitled to Credit for Pre-ERISA Service.** *DiGiacomo v. Teamsters Pension Trust Fund*, 420 F.3d 220 (2005). The majority, in an opinion authored by Judge Garth (Nixon appointee), held that DiGiacomo was entitled to credit for 10.5 years of pre-ERISA work prior to a five year break in service. Alito dissented, saying that ERISA authorized the plan to treat benefits accrued prior to the passage of ERISA as forfeitable upon a break in service.

Examples of Discrimination Decisions of Concern

Raising the Bar on the Evidence Required of Plaintiffs in Race Discrimination Cases. Bray v. Marriott Hotels, 110 F.3d 986 (1997). Bray, a hotel employee, claimed that she was illegally denied a promotion by her employer because of her race. The court majority, in an opinion by Judge McKee (Clinton appointee) and joined by Judge Green (sitting by designation), held that Bray presented sufficient evidence of discrimination to merit a jury trial, but Judge Alito dissented. In his judgment, the evidence established that the hotel had merely committed "minor inconsistencies" in its promotion practices, and it was wrong to allow "disgruntled employees to impose the costs of trial on employers." The majority opinion strongly criticized Judge Alito's "tightly constricted" approach to Title VII:

The dissent argues that none of the evidentiary discrepancies would allow a reasonable jury to doubt Marriott's proffered explanation that it was looking for "the best" candidate and that therefore Bray cannot prevail. We do not believe that Title VII analysis is so tightly constricted. [Title VII] must not be applied in a manner that ignores the sad reality that racial animus can all too easily warp an individual's perspective to the point that he or she never considers the member of a protected class the "best" candidate regardless of that person's credentials. The dissent's position would immunize an employer from the reach of Title VII if the employer's belief that it had selected the "best" candidate was the result of conscious racial bias. . . . Indeed, Title VII would be eviscerated if our analysis were to halt where the dissent suggests.

Prevented Age Discrimination Trial Despite Evidence that Employer said Employee was "Too Old." Keller v. ORIX Credit Alliance, 130 F.3d 1101 (1997). Keller, the former vice president of the corporation, brought an age discrimination case when the president of the company said he might be "too old for the job," that "maybe [he] should go hire one or two young bankers," then passed him over for a promotion and fired him. Over the dissent of other judges, Judge Alito granted summary judgment to the corporation, preventing a trial on the employee's claim, creating a high burden of proof that few victims of age discrimination are likely to meet.

Requiring More Evidence to Prove Gender Discrimination. Sheridan v. E.I. DuPont de Nemours, 100 F.3d 1061 (1996). Judge Alito was the sole dissenter in an en banc gender discrimination case involving the question of whether a gender discrimination plaintiff can get her case to a jury after showing that the employer's alleged reasons for the discriminatory action were a pretext for illegal discrimination.
The court majority followed the same approach as other circuit courts and the Equal Employment Opportunity Commission, and said that plaintiffs should get their day in court if they can show the employer’s alleged reasons are a pretext for illegal discrimination. But Judge Alito dissented, arguing for a narrower rule that would have made it harder for gender discrimination plaintiffs to get to trial.

Other Decisions of Note

Availability of Judicial Review of Base-Closing Decisions. Specter v. Garrett, 971 F.2d 936 (1992) concerned the question of whether decisions to close military bases pursuant to the Base Closure and Realignment Act are subject to judicial review. Senator Arlen Specter, other members of Congress, shipyard employees and their unions, and others, brought suit seeking to enjoin a decision to close the Philadelphia naval shipyard. The majority, in an opinion by Judges Stapleton and Scirica (both Reagan appointees), concluded that the unions had standing to challenge the base closing, and that limited judicial review was available to them. Judge Alito dissented, saying that judicial review of base closing decisions would “thwart the [statutory] scheme’s fundamental objectives” of “speed, finality, and limiting the President and the Congress to an all-or-nothing choice on a package of recommendations.” The court’s mandate was vacated by the Supreme Court’s decision in Franklin v. Massachusetts, involving a challenge to census methods and the means for determining seats in Congress. On reconsideration, the majority reached the same result, i.e., limited judicial review is available to the plaintiffs. Again, Judge Alito dissented and said no judicial review was available. 995 F.2d 404. The Third Circuit’s decision was reversed by the Supreme Court, which held that decisions of the President are not reviewable under the APA, and that the Commission’s decisions being challenged by plaintiffs are not “final agency action.” 511 U.S. 462 (1994).

Reach of Congressional Authority under the Commerce Clause. In United States v. Rybar, 103 F.3d 273 (1996), cert. denied, 522 U.S. 807 (1997), the Third Circuit majority, in an opinion by Judges Sloviter and Rendell (by designation), upheld against a Commerce Clause and Second Amendment challenge a federal statute making it “unlawful for any person to transfer or possess a machine gun.” Five other circuit courts had reached the same conclusion. But Judge Alito dissented, arguing that Congress had not made specific findings or presented empirical evidence demonstrating the connection between the law and interstate commerce, and that the law should be struck down as outside Congress’ legislative powers under the Commerce Clause in light of the Supreme Court’s earlier decision in Lopez, 514 U.S. 549 (1995). In response, the court majority said, “Nothing in Lopez requires either Congress or the Executive to play Show and Tell with the federal courts at the peril of invalidation of a Congressional statute.”