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Government & Politics

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New High-Court Nominee Has Championed Free Speech on Campuses and Questioned Policies on Diversity

By PETER SCHMIDT

Washington



President Bush's latest nominee to the U.S. Supreme Court, Samuel A.

Alito Jr., is a federal appeals-court judge who has championed free speech on campuses while taking a skeptical view of policies intended to protect minority students from verbal harassment or give the minority employees of educational institutions an edge over their colleagues.

Many Republican lawmakers and conservative commentators cheered the president's announcement last week that he had picked Judge Alito to succeed Justice Sandra Day O'Connor, who plans to retire. But several liberal groups immediately declared their opposition to Judge Alito, and key Democratic senators made it clear that they plan to make his confirmation difficult.

Observers across the political spectrum described Judge Alito, who sits on the U.S. Court of Appeals for the Third Circuit, as a right-of-center jurist who is likely to vote with the Supreme Court's conservative members on abortion and other matters. In announcing his nomination, President Bush praised Judge Alito as someone who "has a deep understanding of the proper role of judges in our society" and "understands that judges are to interpret the laws, not impose their preferences or priorities on the people.

Judge Alito — a graduate of Princeton University and Yale Law School — has served on the appeals court since 1990, having won unanimous Senate confirmation to that court after being nominated by George H.W. Bush. In his 15 years on the Third Circuit, which covers Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands, he has weighed in on key cases involving campus speech, affirmative action, and the due-process protections and religious freedoms of college employees.

Last year he wrote the unanimous opinion of a three-judge panel that struck down a 1996 Pennsylvania law prohibiting student newspapers from being paid for alcohol advertisements ([The Chronicle](#), August 13, 2004).

In his ruling in favor of the University of Pittsburgh's student newspaper, he said there was little evidence to support argument that the law against such advertisements had reduced alcohol consumption among students. But the law's impact on the

newspaper's budget was apparent, he said. "If government were free to suppress disfavored speech by preventing potential speakers from being paid, there would not be much left of the First Amendment," he wrote.

Judge Alito showed a willingness to compel school districts to protect the rights of homosexual students in a 2004 case involving a gay youth who was being bullied by other students at a New Jersey high school. But in a 2001 decision, he showed unwillingness to cite concern for the welfare of such students as justification for restricting campus speech.

A Right to Offend

At issue in the 2001 case was the State College Area School District's anti-harassment policy, which prohibited "any unwelcome verbal, written, or physical conduct which offends, denigrates or belittles an individual" based on "race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics."

Writing the unanimous decision of a three-judge panel, Judge Alito sided with students who argued that the policy was overly broad because it prohibited them from voicing religiously based objections to homosexuality. In striking down the policy, he said "there is no question" that the First Amendment "protects a wide variety of speech that listeners may consider deeply offensive," and that the need to protect such speech outweighs concerns that it might disrupt the educational environment.

Although the case, *Saxe v. State College Area School District*, did not deal directly with a higher-education institution, the appeals court's ruling was heralded by advocates of free speech on college campuses as a blow to college policies that restrict speech to protect students from harassment or discrimination.

"From the cases involving student rights that we have seen and studied, it really appears that Judge Alito embraces the marketplace of ideas, including the freedom to offend," said David A. French, president of the Foundation for Individual Rights in Education.

In other key education-related decisions, Judge Alito:

- Joined the Third Circuit majority in a 1996 decision striking down a policy of the Piscataway, N.J., school board that made race a consideration in determining which employees to lay off. The majority opinion by the full appeals court rejected the school district's argument that the policy was justified by the need to ensure that students had minority role models. The court said such a policy would be legal only if it were needed to remedy past discrimination.
- Joined a three-judge panel in a unanimous 2003 ruling making it harder for people to have their student loans forgiven because of bankruptcy. The court's opinion in the

case, *Pelliccia v. U.S. Department of Education*, held that debtors must prove that they have made a good-faith effort to repay the loans from the day the loans were taken out until the bankruptcy filing.

- Joined the Third Circuit majority in a 2001 ruling in favor of a former professor at William Paterson University of New Jersey who alleged that her supervisors had harassed and fired her because she was an observant Jew. In his concurring opinion in the case, Judge Alito wrote that the law does not permit employers "to manipulate job requirements to the purpose of putting an employee to the 'cruel choice' between religion and employment."
- Held in a 1995 decision involving East Stroudsburg University of Pennsylvania that the university had not violated the due-process rights of a campus-police officer in suspending him without a hearing after learning that he had been arrested in a drug raid.
- Dissented from the appeals court majority in a 1991 decision that a student who dropped out of the Medical College of Pennsylvania after a car accident had the right to a lower-court trial on her claims that the college had violated laws protecting the disabled by failing to provide her with seating that accommodated her injuries.

A Much Different Candidate

Harriet E. Miers, President Bush's earlier nominee to fill the seat being vacated by Justice O'Connor, withdrew her name from consideration last month in the face of heavy opposition from conservative Republicans who questioned whether she shared their values. It did not help her cause that — having worked most of her life as a corporate or White House lawyer, and never as a judge — she could offer the Republicans little in the way of a paper trail establishing that she held conservative views.

Some of her conservative critics expressed discomfort with her support, in the early 1990s, of an effort by the Texas Bar Association to guarantee female and minority lawyers seats on the association's Board of Directors. Already unhappy with President Bush's refusal in 2003 to take a hard line against all race-conscious college admissions in two Supreme Court cases involving the University of Michigan at Ann Arbor, they saw reports of Ms. Miers's activities in Texas as reason to suspect that she had a role in the White House's failure to take a stronger stand on affirmative action.

Among other concerns, several leading conservative publications and organizations expressed alarm over a report in [The Chronicle](#) (October 14) that Ms. Miers, as a member of the advisory board of Southern Methodist University's law school, had played a key role in establishing a lecture series that subsequently brought leading feminists to the campus. Among those who cited her involvement

in the lecture series as reason to doubt her conservative credentials were Concerned Women for America, the Family Research Council, *The American Spectator*, and the National Review.

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