

Newest Justice Tips High Court to Right

Alito Cast Key Votes in Major 5 to 4 Rulings on Abortion and Campaign Finance

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On a Supreme Court that has moved consistently to the right, no justice has been more important to the shift than the newest one: Samuel A. Alito Jr.

The solidly conservative Alito's replacement of the more moderate [Sandra Day O'Connor](#) has made the difference in two of this term's biggest decisions -- the vote in April to uphold the federal Partial Birth Abortion Ban Act and its ruling on Monday to substantially weaken the McCain-Feingold campaign finance act.

And Alito's vote will be key today if the court announces what could be a landmark decision about whether public school districts may consider an individual student's race when making assignments to achieve diverse school populations.

"There's no question that Justice Alito is more conservative than Justice O'Connor; there's no question that his replacement of Justice O'Connor moves the court to the right," Washington lawyer Roy T. Englert, a frequent Supreme Court practitioner, said yesterday during a forum at the [Washington Legal Foundation](#).

"The president accomplished what he wanted to do when he appointed [Justice Alito](#) to the court."

But if Alito's consistency has provided the outcomes his advocates hoped for and his detractors feared, his low-key style has not exactly been what was predicted in his bruising confirmation battles.

The appeals court judge from [New Jersey](#) was tagged with the demeaning nickname "Scalito," a reference to the belief he would be an acolyte of Justice [Antonin Scalia](#). The genial Chief Justice John G. Roberts Jr., thought by some Democrats to be more moderate, sailed through his confirmation hearings and received 78 votes in the Senate; only four months later, 20 fewer senators supported Alito.

But in Alito's first full year on the court -- not always the most accurate predictor of a justice's future -- he and Roberts have been virtually interchangeable. The two have been in full agreement in nearly 90 percent of the court's cases this year, according to statistics produced by the Washington law firm Akin Gump Strauss Hauer & Feld.

Alito's votes have provided for "a completely uniform step to the right" for the court, said Akin Gump's Thomas C. Goldstein. But he added that there is a "big difference" in style between Alito and Roberts and their brethren on the right, Scalia and [Clarence Thomas](#).

"Justice Alito, I think, is a very measured conservative, not in the mold of someone who wants to

dramatically rewrite doctrine in the manner that Justice Thomas and Justice Scalia are very comfortable and enthusiastic about."

Alito and Roberts supported each other this week in 5 to 4 decisions that stopped short of what the other conservatives wanted. In the campaign finance decision, which divides the court -- if not the public -- along ideological grounds, Scalia criticized Alito for saying he would wait to see whether a test proposed by Roberts to protect speech rights worked before considering whether the entire provision was unconstitutional, as Scalia believed.

"The wait-and-see approach makes no sense," Scalia wrote. "How will we know that would-be speakers have been chilled and have not spoken? If a tree *does not* fall in the forest, can we hear the sound it would have made had it fallen?"

Such criticism may not be entirely unwelcome, as Alito and Roberts are being criticized from the left for not living up to their pledges to honor stare decisis -- the idea that previous rulings of the court should usually stand.

Although the court has not explicitly overturned specific precedents, Alito has been part of the majority that has implemented an unmistakable shift in the court's holdings.

If a conservative majority rules against the school programs in [Seattle](#) and [Louisville](#), Alito "will have been responsible for overturning three of [O'Connor's] recent landmark decisions," said Georgetown University law professor Martin S. Lederman. He was referring to her role as the fifth vote to strike down a state's prohibition of certain abortion procedures, to find the campaign finance law constitutional and to approve the use of race in admission decisions to the [University of Michigan's](#) law school.

Because the views of Justice [Anthony M. Kennedy](#), the court's swing vote, were already known in those cases, and because Roberts's votes are no different from those of the man he replaced, the late William H. Rehnquist, it is Alito's support that has changed the minority view to the majority opinion.

Lederman has found 31 decisions from 1995 to 2005 in which O'Connor was in the 5 to 4 majority and in which there is a significant chance Alito would vote differently.

Because of the increase in split decisions this year, about double the number from last term, Englert said that Alito's influence may be misinterpreted.

"There is a tendency to take every 5-4 decision and say, 'Oh, this would have been different if Justice O'Connor were still on the court,' " he said. "Sometimes that's true, and sometimes it isn't true."

On the bench, Alito, 57, is a frequent and precise questioner, although not nearly as loquacious as Roberts and Scalia on the right or Justice [Stephen G. Breyer](#) on the left. He is soft-spoken and sometimes comes across as even shy. But the former prosecutor accepts a large number of the speaking requests he receives, often lecturing at universities and appearing before lawyers and other groups.

He has a somewhat deadpan delivery -- he told the National Italian American Foundation in a recent speech that reporters sometimes don't catch his jokes. He said he should perhaps signal such statements with the text-messaging shorthand he has learned from his daughter, a student at [Georgetown University](#).

"JK, JK," he said, which means "just kidding, just kidding."

The first major decision that Alito wrote this term -- a ruling that a lawsuit alleging pay discrimination had been filed too late under terms of Title VII of the Civil Rights Act of 1964 -- has also been one of the court's most controversial.

Justice [Ruth Bader Ginsburg](#) called it a "parsimonious" reading of the law and called on Congress to act. The proposed Lilly Ledbetter Fair Pay Act, named after the plaintiff in the case, was scheduled to be marked up in a House committee yesterday.

Before the Italian American group, Alito accepted praise from a questioner for the decision but quickly noted that not everyone agreed with it. Since he was interpreting the law that Congress passed, Alito said, "it's certainly Congress's prerogative" to change it.

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