Order Code RL33187

Civil Rights Opinions of U.S. Supreme Court Nominee Samuel Alito: A Legal Overview

Updated December 15, 2005

name redacted
Legislative Attorney
American Law Division

Civil Rights Opinions of U.S. Supreme Court Nominee Samuel Alito: A Legal Overview

Summary

During his 15 years as a federal appellate judge on the Third Circuit, Judge Alito has written for the majority, concurred, or dissented in several cases alleging discrimination based on race, ethnicity, gender, religion, and other prohibited grounds. His legal position in these cases has varied, depending on the facts and law being applied, and defy rigid or facile classification. Nonetheless, some continuity in judicial approach, both substantive and procedural, may arguably be discerned from a review of several of his significant opinions.

Contents

Civil Rights Opinions of U.S. Supreme Court Nominee Samuel Alito: A Legal Overview

During his 15 years as a federal appellate judge on the Third Circuit, Judge Alito has written for the majority, concurred, or dissented in several cases alleging discrimination based on race, ethnicity, gender, religion, and other prohibited grounds. His legal position in these cases has varied, depending on the facts and law being applied, and defy rigid or facile classification. Nonetheless, some continuity in judicial approach, both substantive and procedural, may arguably be discerned from a review of several of his significant opinions.

Affirmative Action

In *Hopp v. Pittsburgh*,[1] Judge Alito ruled for the court that there was sufficient evidence to support a jury verdict in favor of nine white police officers who claimed that the City of Pittsburgh discriminated against them when it based hiring decisions in part on oral examinations purportedly designed to minimize the adverse impact of written tests on minority applicants. The city sought to hire experienced officers to replace a large number of officers taking early retirement. In order to curb potential disparate impact problems, the city used a combination of a written and oral examinations instead of relying solely on the written test that had previously been used to select officers. The white officers, all of whom had prior experience with other police agencies, sued for race discrimination under the Civil Rights Act of 1866[2] after they performed well on the required written tests, but were rejected because they failed the oral examination. In upholding the verdict for the white officers, Judge Alito pointed to evidence that the previous written examination was not culturally biased and had been a good predictor of job performance; that the city refused to explain why any of the plaintiffs failed the oral examination; that the city set the failure rate on the oral examination so as to exclude more white candidates; and that the city failed many whites who performed well on the written examination, while rejecting very few poorly performing minority candidates.

Previously, the Third Circuit *en banc* had examined the issue of race-conscious employment practices to achieve teacher diversity in the public schools. Judge Alito did not write the court's opinion in *Taxman v. Board of Education*,[3] nor did he file a separate concurrence or dissent, but was instead apparently content to join the majority led by Judge Mansmann. A white teacher had sued the Piscataway, New Jersey school board after being laid off in favor of a concededly "equally qualified"

---

[1] 194 F.3d 434 (3d Cir. 1999).

[2] 42 U.S.C. §1981.

[3] 91 F.3d 1547 (3d Cir. 1996), cert. dismissed 522 U.S.1010 (1997).

black colleague, who was the only minority member of the school's business faculty. The district court granted partial summary judgment for the plaintiff on his statutory federal civil rights claim, holding that the school board's action was overly intrusive on the rights of non-minorities. No claim of violation of the Equal Protection Clause was made as the statute of limitations for any alleged constitutional violation had expired.

The Third Circuit concluded that the race-based discharge and retention decisions resulted from the board's effort, not to remedy past discrimination, but to promote racial diversity. It agreed that the board's non-remedial objective to maintain a diverse faculty violated the racial discrimination ban in Title VII of the 1964 Civil Rights Act.[4] On the basis of Supreme Court precedent,[5] the circuit court reasoned, to pass Title VII muster, an affirmative action plan 1) must "have purposes that mirror those of the statute," and 2) must not "unnecessarily trammel the interests" of nonminority workers.[6] Finding "no congressional recognition of diversity as a Title VII objective requiring accommodation," the court was "convinced that unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and, therefore, cannot satisfy the first prong of the *Weber* test."[7] An appeal of the Piscataway case was eventually dismissed by the U.S. Supreme Court in 1997 without a ruling by the Justices on the merits.[8] And, of course, the Third Circuit's decision preceded by several years the Supreme Court's 5 to 4 ruling in the Michigan affirmative action case, *Grutter v. Bollinger*,[9] where Justice O'Connor narrowly approved the constitutionality of a race-based student admissions plan to achieve diversity in higher education.

Burden of Proof Issues

Directly implicated in several race and gender cases heard by the Third Circuit during Judge Alito's tenure is the burden-of-proof framework developed by the Supreme Court for analysing Title VII claims of "disparate treatment" or intentional employment discrimination.[10] Under the so-called "McDonnell Douglas" formula, once the employee or applicant establishes a prima facie case of discriminatory motivation — by demonstrating that she is the member of a protected class, that she was qualified and applied, but was nonetheless passed over for employment or promotion — the "burden of production" shifts to the employer "to articulate some

---

[4] 42 U.S.C. 2000e et seq.

[5] Citing United Steelworkers v. Weber, 443 U..S. 193 (1979); Johnson v. Transportation Agency, 480 U.S. 616 (1987).

[6] 91 F.3d at 1550.

[7] Id. at 1557, 1558.

[8] Piscataway Township Board of Education, v. Taxman, 522 U.S. 1010 (1997).

[9] 539 U.S. 506 (2003).

[10] See McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973); St. Mary's Honor Society v. Hicks, 509 U.S. 502 (1993); Reeves v. Sanderson Plumbing , 530 U.S. 133 (2001); Desert Place Inc. v. Costa, 530 U.S. 90 (2003).

legitimate, nondiscriminatory reason" for the alleged unlawful conduct.[11] The employer's burden is minimal, however, and it remains for the complainant to rebut this explanation as "pretextual," with evidence either undermining its credibility or otherwise proving that discrimination more likely motivated the employer's action. What is more, if she is to prevail, the plaintiff employee has the ultimate "burden of persuasion" for proving by a "preponderance" of the evidence that discrimination actually occurred.

Certain ambiguities in the law, however, left lower courts uncertain whether the complainant could rely exclusively on "pretext" evidence to carry her ultimate burden or had to produce additional affirmative evidence of unlawful employer motive. According to *St. Mary's Honor Society v. Hicks*,[12] when a complainant demonstrates pretext, the fact-finder is allowed to infer discrimination, but it is not required to do so. A showing of pretext alone did not compel a decision for the applicant or employee.[13] This so-called "permissive pretext" standard helped to settle a circuit court split on the issue at that time.[14] Nonetheless, lower courts continued to differ as to the quantum and quality of proof necessary to preserve an employee's disparate treatment claim from summary judgment motion or a directed verdict for the employer. The Third Circuit apparently permits survival of the action premised solely on rebuttal evidence attacking the reasonableness of the employer's proffered explanation for its conduct. Justice Alito's views, on the other hand, seem more attuned to the stricter judicial standard adopted by other courts, calling for further evidence of discrimination beyond proven pretext to permit the action to go forward.

In a post-*Hicks* decision, *Sheridan v. E.I. DuPont de Nemours and Co.*,[15] the *en banc* court applied a pretext only rationale to the claim of sex discrimination against a female "Head Captain" in a Dupont-owned hotel who was passed over for promotion to a higher management position. Writing for the majority, Judge Sloviter reversed the district court's grant of judgment as a matter of law to the employer because *Hicks* did not compel the presentation of additional evidence of the employer's discriminatory motive, which could be proven by discrediting the employer's nondiscriminatory reasons.

Judge Alito filed the only dissenting opinion in *Sheridan*. Primarily, he disagreed with the majority's premise that under *Hicks*, proof of the elements of a *prima facie* case and proof of pretext will always survive a defense motion for summary judgment or judgment as a matter of law. Judge Alito argued that the majority's blanket rule was analytically unsound because proof that is sufficient to

---

[11] McDonnell Douglas, 411 U.S. at 802.

[12] Supra n. 10.

[13] 509 U.S. at 511. The complainant did not have to introduce further evidence to support a finding of discrimination; the "factfinder's disbelief of the reasons put forward by the [employer] . . . may, together with elements of the prima facie case, suffice to show intentional discrimination." Id. However, the ultimate question is whether, after all the evidence is in, the complainant has proved her case by a preponderance of the evidence.

[14] See Kline v. Tennessee Valley Authority, 128 F.3d 377, 343-44 (6th Cir. 1997).

[15] 100 F.3d 1061 (3d Cir 1061 (3d Cir. 1996), cert. denied, 521 U.S. 1129 (1997).

justify disbelief of the employer will not always suffice for finding discriminatory motive. In place of the blanket rule endorsed by the majority, the dissent suggested a different test that would "avoid analytical difficulties that the majority's test create[d]."[16] Under his test, an employer's nonsuit motion is improper if "a rational trier of fact could find, based on the record, that discrimination on the ground alleged was the determinative cause of the challenged employment action."[17] Applying this test, Judge Alito agreed with the district judge's analysis of the record and would have imposed on the plaintiff a weightier burden with respect to proof of employer motivation than the Sheridan majority.

In *Glass v. Philadelphia Electric Co.*[18] the Third Circuit considered the effect of certain rulings by the district court which had excluded evidence of alleged race and age discrimination, and retaliation, in several refusals to promote the complainant, resulting in a jury verdict for the employer. Throughout his 23 years of employment with the company, Glass received only one job evaluation that was less than fully satisfactory, for the two-year period of 1984-86. While admitting evidence of Glass' performance during that period, the district court excluded his counter-explanation that racial harassment by co-workers during that time had a negative effect on his job performance, accounting for those shortcomings.

In reversing and remanding for a new trial, a majority of the Third Circuit found that the district court abused its discretion by repeatedly excluding evidence of harassment relating to a key aspect of the case. Complainant's evidence regarding explanation or justification for his poor performance evaluation — one of several nondiscriminatory reasons asserted by the company for its action — was relevant to the question of pretext and should have been admitted to enable him to meet his burden of proving intentional discrimination. Judge Alito dissented, noting that the evidence of harassment has some, but limited probative value. The company had not relied heavily on the poor performance rating to explain its action, he found, and Glass had been able to bring out some evidence of his having been harassed. Moreover, even if an abuse of discretion, Judge Alito concluded that the ruling was harmless error. Thus, he ruled against the employee in the case and would have denied his request for a new trial.

Judge Alito also filed a dissent from the majority opinion in *Bray v. Marriott Hotel*,[19] another failure to promote case. In three years, Bray, an African-American, had worked her way up from room attendant to housingkeeping manager at the Marriot Hotels. When the position of Bray's immediate supervisor became vacant in 1993, she applied but lost out to another internal candidate — a white female who worked at a larger Marriot facility. Bray filed suit, claiming that she had been denied promotion on account of race.

---

[16] 100 F.3d at 1087 (Alito, dissenting).

[17] Id. at 1088.

[18] 34 F.3d 188 (3d Cir. 1994)

[19] 110 F.3d 986 (3d Cir. 1997).

The trial court granted the employer's motion to have the case dismissed before trial on the basis of a 1994 Third Circuit decision, *Fuentes v. Perskie*. Under *Fuentes*, the employee had to cast substantial doubt on the employer's proffered legitimate, nondiscriminatory reason for the failure to promote in order to defeat pre-trial dismissal.[20] To meet its burden, Marriott presented extensive evidence suggesting that the candidate selected had superior objective qualifications to Bray. The employee countered with evidence that Marriot had, to Bray's disadvantage, failed to follow its own stated procedures for filling the position and that some of the objective, quantifiable measures relied upon were faulty in material respects.

A three-judge panel of the Third Circuit decided that the complainant's rebuttal evidence raised sufficient doubts as to the employer's failure to promote her and remanded for a jury trial. The issue was not merely whether Marriott was seeking the best candidate but whether a reasonable factfinder could conclude that the black employee was not deemed best because of her race, the majority explained. Thus, the jury had to decide whether alleged discrepancies in the promotion procedures and evaluation of the black candidate's qualifications were the product of racial bias.

Dissenting, Judge Alito argued that Bray failed to "point to evidence from which a reasonable factfinder can 'disbelieve the employer's articulated reasons'" that it was seeking the best qualified candidate or that the candidate selected was better qualified than Bray. Furthermore, he argued, evidence of unfairness in the selection process — the employer's failure to follow its internal procedures — not linked to discriminatory animus should not survive summary judgment "so long as the employer's proffered legitimate reason for the employment decision remains intact."

In another dissenting opinion, *Zubi v. AT&T Corp.*[21], Judge Alito opted for a broader interpretation of the 1866 Civil Rights Act[22] than the three-judge panel majority, which found that plaintiff's civil action for wrongful termination due to race was barred by a two-year statute of limitations. A 1990 federal law provided that "a civil action arising under an Act of Congress enacted after the date of enactment of this section may not be commenced later than four years after the cause of action accrues."[23] Section 1981 originated more than a century earlier, the panel opinion reasoned, so following accepted procedure in the absence of a more specific statute of limitations, the court "borrowed" the shorter statute of limitations provided by the state in which the case was heard.

Judge Alito's dissent took a different textual approach to the 1990 statute of limitations provision, which focused on the meaning of "Act of Congress" in the statute. Judge Alito noted that in 1991, Congress amended § 1981 to broaden the

---

[20] 110 F.3d 986 (3d Cir. 1997). In the court's words, the employee must "demonstrate such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence."

[21] 219 F.3d 220 (3d Cir. 2000).

[22] 42 U.S.C. § 1981.

[23] 28 U.S.C. § 1658.

1866 Act's ban on racial discrimination in "mak[ing] and enforc[ing]" contracts to include "termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."[24] "[A]s a result of the 1991 Act, a plaintiff may now sue under § 1981 for discriminatory termination of employment — and that is precisely what Zubi did here." Thus, "in any realistic sense," the 1991 amendment to the Civil Rights Act "'create[d] the cause of action' for racially discriminatory termination of employment that Zubi asserted."[25] Because Zubi asserted his claim less than four years after the termination occurred, Judge Alito would have allowed the suit to go forward. Under the approach of the majority, the dissent concluded:

> most Acts of Congress that amend prior Acts of Congress do not qualify as Acts of Congress under § 1658 [the four-year statute of limitations]. In footnote 5, however, the majority says that not all enactments styled as amendments are real amendments, and thus some amendments may count as Acts of Congress under §1658. The majority may regard this as 'the closest thing to a bright line rule.' I do not.[26]

Harassment

Writing for the court in *Robinson v. City of Pittsburgh*,[27] Judge Alito explained the Third Circuit's position as regards the required elements for proof of retaliation claims and "quid pro quo" sexual harassment. Generally, "quid pro quo" harassment refers to situations where an employer conditions its employment decisions affecting specific workers on those individuals' submission or rejection of unwanted sexual advances or other verbal or physical conduct of a sexual nature. It differs from "hostile environment" harassment, which usually describes serious and pervasive workplace abuse of a physical or verbal nature that substantially interferes with an employee's ability to perform her duties. From a legal defense standpoint, however, the distinction has been largely eroded by subsequent Supreme Court decisions.[28]

In 1994, a female city police officer complained to her department's assistant chief that she had been physically and verbally abused over a two-year period by her immediate supervisor — a police lieutenant — who made repeated unwanted sexual advances. In retaliation, Robinson asserted, the harassing supervisor unjustly reprimanded her in front of others and gave her a "bad reputation at work." Moreover, she claimed that after rejecting his advances, her computer access was restricted, her promotion to detective was blocked, and she was forced by management to continue to work under the harasser. The police department's Office of Professional Standards found probable cause to credit her complaint. But at trial,

---

[24] Civil Rights Act of 1991, P.L. 102-166, § 101, 105 Stat. 1071 (codified at 42 U.S.C. § 1981(b).

[25] 219 F.3d at 230 (Alito J, dissenting).

[26] Id. at 231.

[27] 120 F.3d 1286 (3d Cir. 1997).

[28] See Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

the district court summarily dismissed part of her complaint against the city, its police chief, and assistant chief, while the jury found for the city on the remainder.

The appeals court affirmed in part, reversed in part, and remanded. Judge Alito ruled, first, that the oral reprimands and derogatory comments were insufficient to support a retaliation claim. In his opinion, "not everything that makes an employee unhappy qualifies as retaliation, for otherwise, minor and even trivial employment actions that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit."[29] Reprimands and comments did not constitute "adverse employment action" because they did not alter Robinson's "compensation, terms, conditions, or privileges of employment," deprive her of "employment opportunities," or adversely affect her status as an employee. Nor could a retaliation claim be based on the other actions alleged since, other than timing, there was no evidence of a "causal link" to her filing an EEOC charge. Second, the court rejected Robinson's contention that her supervisor's harsh reprimands in the presence of other employees amounted to a hostile work environment. And lacking evidence that city's police chief — as its agent — had actual knowledge of earlier incidents of offensive touching and other physical abuse, a jury verdict absolving the city of *respondeat superior* liability was also affirmed.

There was, however, enough evidence to support a jury finding that Robinson was denied a transfer for refusing the alleged perpetrator's unwanted sexual advances. "In contrast to minor slights like 'negative comments,' receiving or being denied a desired promotion is sufficiently serious and tangible to constitute a change in the employee's 'terms, conditions, or privileges' of employment."[30] In particular, Judge Alito pointed to evidence that the alleged harasser had made sure that Robinson did not appear on the department's transfer lists, despite his repeated assurances that he would recommend her. Thus, the court found the evidence of *quid pro quo* harassment in Robinson's promotion blocking claim at least sufficient to allow a jury to decide the issue, and remanded for that purpose. The rest of her complaint was dismissed.

In another opinion by Judge Alito, the Third Circuit rejected a *per se* rule making it a violation of Title VII for the employer to return a sexual harassment victim to a job position requiring her contact with co-workers responsible for the earlier hostile work environment. In *Konstantopoulos v. Westvaco Corp.*,[31] the only woman in a traditionally all-male department, who complained to her supervisors of repeated sexual comments, obscene gestures, and physical threats by two male co-workers, was transferred by supervisors to another work group in the same department. The company also warned the named harassers that any further complaints against them could lead to disciplinary action. Upon her return from seven months of medical leave for severe work-induced stress, the plaintiff was returned to the workgroup site of the earlier harassment, after further assurances by the supervisor who made frequent monitoring visits. The plaintiff resigned after one

---

[29] 120 F.3d at 1299.

[30] Id.

[31] 112 F.3d 710 (3d Cir. 1997).

day, alleging that her former harassers "squinted their eyes . . . and shook their fists at her" and that another co-worker threw away her lunch.

The Third Circuit affirmed the district court's finding that although the employee had been subjected to sexual harassment during her first period of employment, the alleged incidents upon her return from medical leave were not severe or pervasive enough to have created a hostile work environment. In reaching this decision, Judge Alito reasoned that the nearly seven month hiatus between the earlier and later episodes was significant in that it provided an opportunity for the lingering effects of the prior incidents to dissipate. In addition, he explained that upon the employee's return to work, the employer had provided procedures by which any improper conduct by the co-workers could have been remedied. Finally, the court rejected the employee's contention that her mere reassignment to the same work group as two of her previous harassers was enough to support the conclusion that she was subjected to a continuing hostile work environment when she returned to work. Rather, Judge Alito found that given the totality of the circumstances, the employee had failed to establish a hostile work environment during the second period of her employment.

In 2001, Judge Alito wrote the unanimous decision for a three — judge court that struck down Pennsylvania State College Area School District's anti-harassment policy. That policy prohibited "any unwelcome verbal or physical conduct which offends, denigrates, or belittles an individual" based on "race, religion, color, national origin, sexual orientation, disability or other personal characteristics . . ." with "the purpose or effect of . . . creating an intimidating hostile or offensive environment." A § 1983 suit was brought in *Saxe v. State College Area School District*[32] on behalf of students seeking to have the policy enjoined for vagueness and overbreadth. Specifically, the students argued that the law prohibited them from voicing religiously based objections to homosexuality.

The district court upheld the policy and granted the district's motion to dismiss. Writing for the appellate panel, Judge Alito focused on judicial development of a private right of action for employees and students claiming "abusive and discriminatory conduct that creates a 'hostile environment' . . . ." and rejected the lower court's sweeping statement that the First Amendment has never protected harassment. "Such a categorical rule," he wrote, "is without precedent in the decisions of the Supreme Court or this court, and it belies the very real tension between antiharassment laws and the Constitution's guarantee of freedom of speech."[33] Emphasizing a constitutional distinction between protected expressive harassing speech and unprotected nonexpressive conduct, the policy here was fatally overbroad for two reasons. First, it reached sexual orientation and "other personal characteristics" beyond the scope of existing law. Secondly, while existing law required evidence that the complainants' educational or job performance was affected, the district policy merely punished speech that had the effect or mere purpose of harassing another.

---

[32] 240 F.3d 200, 203 (3d Cir. 2001).

[33] Id. at 209.

Religion

In *Fraternal Order of Police v. Newark*,[34] the Newark, New Jersey Police Department had adopted a policy prohibiting its officers from wearing beards. While labeled a "Zero Tolerance" policy by the Chief of Police, exceptions were made for medical reasons and for "undercover officers whose 'assignments or duties permit a departure from the requirements.'" However, the department refused to grant an exemption to two Muslim officers who were compelled by their religious beliefs to grow beards.

The Third Circuit held that the department's decisions to allow exemptions for medical but not religious reasons triggered heightened scrutiny under the First Amendment. Judge Alito's opinion for the court tracked Supreme Court precedent regarding underinclusiveness as a key factor in defining the applicability of general and non-general laws to religious entities. The no-beard policy was underinclusive because beards grown for medical reasons no less than religion undermined the department's interest in uniformity and "public confidence" in the police force. Thus, "the medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e. medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not."[35] This underinclusiveness was "sufficiently suggestive of discriminatory intent so as to trigger neightened scrutiny" under the Constitution. [36] That the exception for medical beards was adopted to address a legitimate governmental interest — accommodating the medical needs of certain police officers — was irrelevant to the court's analysis of the general applicability requirement. Thus, while it was proper for the state to accommodate secular hardships, Judge Alito found that religious hardships were entitled to equal consideration.

In *Abramson v. William Patterson College*,[37] Judge Alito filed a concurring opinion in the case of a Sabbath-observant Orthodox Jewish woman who complained of discrimination and harassment while a tenure-track associate professor as the consequence of her desire to have her religious observance accommodated by her employer. Plaintiff scheduled her classes to minimize conflicts with Jewish holidays but allegedly encountered hostility from the college dean and her departmental chair, who ignored her requests by repeatedly scheduling meetings and conferences for Friday nights and Saturdays. The district court dismissed the plaintiff's Title VII claims of religious harassment, discrimination and retaliation, finding that the college presented reasonable and nondiscriminatory explanations for decisions affecting Abramson's employment.

On appeal, the three-judge court rejected each of the college's justifications for its treatment of Abramson and held that she was entitled to proceed with all of her claims. Judge Alito's concurrence appeared even broader, drawing on views

---

[34] 170 F.3d 359 (3d Cir. 1999).

[35] Id. at 365.

[36] Id. at 364.

[37] 260 F.3d 265 (3r Cir. 2001).

expressed by Justices Stewart and Brennan in the 1960's Sunday Closing Law case, *Braunfeld v. Brown.*[38] Judge Alito concluded that "Title VII does not permit an employer to manipulate job requirements for the purpose of putting an employee to the cruel choice between religion and employment." Thus, he would have held that deliberately scheduling faculty meetings for Friday afternoons and thus putting a Sabbath observer to this "cruel choice" violated the Civil Rights Act.[39]

ALJ Bias in the Social Security Administration (SSA)

Grant v. Shalala[40] raised a novel issue as to the proper role of federal district courts in reviewing a class action claim of alleged racial and ethnic bias by an administrative law judge (ALJ) for denying Social Security disability benefits to black and hispanic applicants. The plaintiff class alleged that the ALJ in question was biased against all disability claimants and was "inclined in every disability case to deny benefits." According to the class complaint, the ALJ was alleged to have stated to colleagues that:

> claimants living in hispanic, black or poor white communities are only 'attempting to milk the system', that they are 'perfectly able of going out and earning a living', that they 'preferred living on public monies', 'that he had no intention of paying them' and that 'he did not care what the evidence showed.'[41]

The case was certified as a class action for all claimants who had or would receive adverse decisions from this ALJ. While the case was pending, the Health and Human Services Secretary ordered an internal panel investigation which, after a detailed examination of 212 of the ALJ's cases, concluded that the charges of bias against the claimants were generally unfounded. The *Grant* plaintiffs sought declaratory and injunctive relief requiring rehearing of their claims and prohibiting the HHS Secretary from assigning the challenged ALJ to Social Security hearings.

Judge Alito's opinion for an appellate panel of the Third Circuit focused on whether the district court could make its own findings of fact regarding the ALJ's bias or was instead restricted to reviewing the factual findings of the HHS Secretary. The majority concluded that the action had to be dismissed and that permitting discovery was inappropriate because the courts lacked jurisdiction to make *de novo* determination of the issues raised. First, entertaining suit would contravene the Social Security statute, which limited judicial review of the SSA's actions.[42] The fact finding role in Social Security cases is exclusively within the domain of the agency, Judge Alito opined, which remains available to make any additional factual determinations deemed necessary on remand by the district court. Otherwise, where HHS has conducted an investigation and issued a report, Judge Alito found that the

---

[38] 366 U.S. 599 (1961).

[39] 260 F.3d at 290.

[40] 989 F.2d 1332 (3d Cir. 1993).

[41] Id. at 1347.

[42] 42 U.S.C. § 405(g).

proper course was to undertake judicial review of the record, as established before the agency.

The crucial factor in the court's decision was Judge Alito's view that discovery and trial would compromise ALJ independence. "It has long been recognized that attempts to probe the thoughts and decisionmaking processes of judges . . . are generally improper," he noted, and to permit *de novo* review in *Grant* would pose a substantial threat to the administrative process. Every ALJ would work under the threat of being subjected to such treatment if his or her pattern of decisions displeased any administrative litigant or group with the resources to put together a suit charging bias."[43] In addition, Judge Alito believed that the claimants' interests were adequately served since the investigative panel convened by the agency in this case had analyzed a broad random sample of decisions and "while it did not find any evidence of bias, the panel criticized certain practices that it detected."[44] In dissent, Judge Higgenbotham disagreed on both points, finding that the constitutionally mandated independence of Article III judges was out of place as applied by the majority to statutory ALJs, and that procedural deficiencies with the internal panel process — coupled with inherent conflict of interest concerns — made it inappropriate to leave determination of bias remedies to the agency.

Jury Exclusion

During Judge Alito's tenure on the Third Circuit, the court has reviewed several cases alleging discriminatory exclusion of minority group members from criminal juries. The Supreme Court, in *Batson v. Kentucky*,[45] held that a peremptory challenge based on a juror's race violated the Equal Protection Clause regardless of whether the criminal defendant could show a history of exercising racially discriminatory strikes by the prosecutor. *Batson* established a three-part test. First, the defendant must prove a *prima face* case of discrimination by the prosecutor — basically, that he is a member of the same racial group as persons peremptorily struck from the jury pool. Second, the prosecutor must rebut this accusation with race-neutral reasons for striking the black jurors in question. Finally, the trial court must assess the legitimacy of the prosecutor's reasons and determine, based on the totality of evidence, whether there has been unconstitutional use of peremptory strikes.[46] Although no single factor may be dispositive, a prima facie case is frequently found where the litigant strikes all prospective jurors from a given racial group.[47]

The Third Circuit reviewed the application of *Batson* to racial jury exclusion cases in *Riley v. Taylor*.[48] Riley was sentenced to death for the murder of a liquor store owner in the course of a robbery. As the robbers were leaving the store,

---

[43] Id at 1345.

[44] Id at 1346.

[45] 476 U.S. 79 (1986).

[46] Id. at 96-99.

[47] United States v. Esparsen, 930 F.2d 1461 (10th Cir. 1991).

[48] 277 F.3d 261 (3d Cir. 2001).

evidence indicated that the storeowner — who had been shot in the leg for resisting — shouted racial slurs and threw a bottle at them. The defendant then turned and again shot the victim, killing him. At trial, all prospective black jurors were eliminated by state peremptory challenges, leaving an all-white jury. Riley was convicted on intentional and felony murder charges. He appealed his conviction and sentence on several grounds, most notably that "the prosecution had exercised its peremptory challenges in a racially discriminatory manner."[49] According to the prosecutor, one juror was struck because he hesitated when questioned about his ability to return a death sentence; another because of work conflicts; and the third, because she testified that she could not impose the death penalty. All of Riley's *Batson* claims were denied after several state and federal court hearings.

On rehearing *en banc*, the Third Circuit reversed a three-judge panel opinion by Judge Alito — later withdrawn — which refused the capital convictee's *Batson* claim.[50] The majority employed several techniques to determine the prosecutor's race-neutral reasons for pretext, including comparisons of stricken black jurors and seated white jurors, referral to prosecutor's briefs and review of trial transcripts. Another factor for its disagreement with the courts below was a statistical analysis of patterns of jury exclusion, which indicated that minority jurors had been eliminated from all four of the first degree murder trials in the county during the year of the trial. Moreover, it appears that the state, at its own request, was granted four weeks to rebut these statistics, but never produced any evidence.

> It may be that such evidence, standing alone, would not be sufficient to show intentional discrimination in selection of juries. . . . It is, however, particularly troublesome because the State failed to provide rebuttal data . . .when given the opportunity which it requested. In that circumstance, an inference adverse to the State may be fairly drawn.[51]

Thus, the majority refused to credit the lower courts' denial of the defendant's *Batson* claim, finding the prosecutor's race-neutral reasons "incredible, contradicted, and implausible . . .," based on "all the facts and circumstances."[52]

This drew a dissent from Judge Alito, who was particularly troubled by what he viewed as the majority's "misleading" and "simplistic" statistical approach that treated potential jurors as though they were merely "black and white marbles in a jar," lacking other characteristics that might explain why, apart from race, prosecutors had excluded them.

> The majority's reliance on statistical evidence is even worse. With respect to [the three other cases] no information was provided at the time — and none has been provided since — about the identities of the prosecutors who participated

---

[49] Id at 272.

[50] 237 F.3d 300 (3d Cir. 2001).

[51] 277 F.2d at 283

[52] 277 F.3d at 285-86.

> in jury selection, the racial makeup of the venire, or the race of jurors who were dismissed for cause or peremptorily challenged by the defense.[53]

"In reality," Judge Alito concluded, "these individuals had many other characteristics, and without taking those variables into account, it is simply not possible to determine whether the prosecution's strikes were based on race or something else."[54]

Providing an interesting counterpoint to *Riley v. Taylor* is Judge Alito's 2005 opinion for the three-judge panel in *Brinson v. Vaughn*.[55] The selection of a jury for the murder trial of Brinson, an African-American, was completed two days before the *Batson* decision was announced. According to defense attorneys, the prosecutor in the case "exercised fourteen peremptory challenges, thirteen for blacks," and he "seldom, if ever, questioned blacks prior to exercising his peremptory challenges."[56] Without denying these assertions, the prosecutor countered that

> he did not remember the race of each juror who he had peremptorily challenged, that he recalled striking both African-Americans and whites, that he had not used all of his allotted strikes, and that three African-Americans had been selected for the jury.[57]

The defendant was found guilty of first-degree murder and sentenced to life imprisonment. Thereafter, while *habeas* motions were pending, a post-*Batson* training video for Philadelphia prosecutors was released to the public in which Brinson's prosecutor advocated the use of peremptory strikes to eliminate black jurors. Nonetheless, a district court denied the defendant's petitions for failure to establish a *prima facie* case under *Batson*.

Judge Alito rejected as contrary to *Batson* all of the proffered explanations by state and federal courts below for denying *habeas* relief. First, he found that the prosecution decision to accept some black jurors did not justify its elimination of others. Also, the lower courts erred in holding that because the perpetrator, victim and witnesses were African-American, Brinson had not presented a *prima facie* case. Instead, Judge Alito found the *Batson* standard satisfied when "'all relevant circumstances' give rise to 'the necessary inference of purposeful discrimination.'"[58] Here, he emphasized, the prosecutor "did not deny that he had used 13 of 14 strikes against African-Americans. Nor did he deny that he used all but one of his strikes against African-Americans. Nor did he say that, while unable to recall the exact figures, he remembered that his pattern of strikes was not anything like that alleged

---

[53] Id. at 326.

[54] Id.

[55] 398 F.3d 224 (3d Cir. 2005).

[56] Id. at 227.

[57] Id.

[58] Id. at 235.

by the defense."[59] In the absence of any circumstance that might provide a legitimate reason, the stark pattern of strikes against blacks shown in this case required trial to proceed on the *Batson* challenge, even without the videotape. Thus, Judge Alito concluded:

> We hold that the state courts' rejection of Brinson's *Batson* claim . . . cannot be sustained . . . [and] therefore reverse the order of the District Court and remand. On remand, the Commonwealth should be given the opportunity to provide legitimate reasons for any strikes against African-Americans. If it is unable to provide such explanation, Brinson will be entitled to habeas relief. If the Commonwealth is able to provide nondiscriminatory reasons for the strikes, then the District Court will be required to make findings as to whether the strikes were based on race.[60]

In 1991, *Hernandez v. New York*[61] established that a prosecutor's peremptory challenges of Spanish-speaking Latino jurors based on doubts about the ability of such jurors to defer to the official translation of Spanish-language testimony did not violate the Equal Protection Clause. Significantly, the Supreme Court there found that the prosecutor did not rely on "language ability without more," but on the "specific responses and demeanor" of the prospective juror during *voir dire*. As in racial exclusion cases, language-based classifications could be challenged if shown to be a pretext or "surrogate" for ethnicity-based discrimination. Yet the Court was satisfied by the prosecutor's explanation in *Hernandez* that "language plus" other qualifications unrelated to ethnicity motivated the peremptory strikes. In *Pemberthy v. Beyer*,[62] Judge Alito disposed of the question reserved in *Hernandez* by upholding the constitutionality of peremptory challenges based solely on foreign language ability.

In *Pemberthy* and a companion case, the State of New Jersey appealed issuance of two *habeas corpus* writs by a federal district court. A state jury had convicted two defendants on conspiracy and drug distribution charges based on taped phone conversations translated from Spanish into English at trial. During *voir dire*, the prosecutor exercised peremptory challenges against five Spanish-speaking jurors whose bilingual ability, he believed, made it less likely that they would follow the official court translations. Later comments by the prosecutor that Spanish-speakers might "have a leg up" on other jurors — coupled with a trial court determination that Spanish language ability was "the defining characteristic" of Hispanic origin — persuaded the district judge that the disputed challenges lacked a credible race-neutral justification or were ethnically motivated. The convictions were set-aside.

In his opinion for the Third Circuit, Judge Alito reversed the decision below. On the issue of racial motivation, the appeals court rejected the district court's findings, but nonetheless

---

[59] Id. at 234.

[60] Id. at 235.

[61] 500 U.S. 352 (1991).

[62] 19 F.3d 857 (3d Cir. 1994).

> emphasiz[ed] in the strongest terms that a peremptory challenger's decision that is actually motivated by racial or ethnic considerations continues to be subject to strict scrutiny even when the attorney asserts that he or she is categorizing juries by linguistic ability rather than race or ethnicity.[63]

Accordingly, while equal protection did not bar peremptory strikes based on language alone, "[b]ecause language-speaking ability is so closely correlated with ethnicity, a trial court must carefully assess the challenger's actual motivation."[64] Since only four of the five challenged jurors in *Pemberthy* were Latinos, however, Judge Alito did not equate their exclusion with ethnic discrimination. Moreover, language issues inherent in the case made plausible prosecution concerns that all jurors deliberate on the same basis — not dominated by the few who may have greater facility in Spanish than the official translators. Thus, the decision appears to carry *Hernandez* a step further in that language alone, rather than "language plus," was deemed to be a constitutionally justifiable basis for peremptory strikes that disproportionately affect Latino jurors. Nonetheless, language may not be treated as a "surrogate for race," and Judge Alito added, bilingual jurors may only be excused if Spanish language testimony is "central" to the case.

---

[63] Id. at 872.

[64] Id. Among factors noted in Pemberthy for determining a prosecutor's motivation in striking jurors: 1) any extrinsic evidence of motivation, 2) whether the prosecutor's strikes correlate better with language ability or with race, and 3) how strong the challenger's reasons are to fear that translation issues will present a problem.