

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered within the hourglass. The text is overlaid on the hourglass.

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*U.S. Supreme Court Nominee Samuel A. Alito and the
Abortion Opinions of the U.S. Court of Appeals for the Third
Circuit*

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December 16, 2005

Abstract. On October 31, 2005, Judge Samuel A. Alito was nominated by President George W. Bush to replace retiring Associate Justice Sandra Day O'Connor. During his tenure with the U.S. Circuit Court of Appeals for the Third Circuit, the court considered a number of abortion cases, including *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a case that was later heard by the U.S. Supreme Court. This report reviews the Third Circuit's notable abortion opinions during Judge Alito's tenure and examines his concurring and dissenting opinions in some of those cases.

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Summary

On October 31, 2005, Judge Samuel A. Alito was nominated by President George W. Bush to replace retiring Associate Justice Sandra Day O'Connor. During his tenure with the U.S. Circuit Court of Appeals for the Third Circuit, the court considered a number of abortion cases, including *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a case that was later heard by the U.S. Supreme Court. This report reviews the Third Circuit's notable abortion opinions during Judge Alito's tenure and examines his concurring and dissenting opinions in some of those cases.

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U.S. Supreme Court Nominee Samuel A. Alito and the Abortion Opinions of the U.S. Court of Appeals for the Third Circuit

On October 31, 2005, Judge Samuel A. Alito was nominated by President George W. Bush to replace retiring Associate Justice Sandra Day O'Connor. During his tenure with the U.S. Circuit Court of Appeals for the Third Circuit, the court considered a number of abortion cases, including *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a case that was later heard by the U.S. Supreme Court. This report reviews the Third Circuit's notable abortion opinions during Judge Alito's tenure and examines his concurring and dissenting opinions in some of those cases. Judge Alito did not author the opinion of the court in any of the four cases discussed in this report.¹

Planned Parenthood of Southeastern Pennsylvania v. Casey

In *Casey*, the Third Circuit considered whether certain sections of the Pennsylvania Abortion Control Act of 1982 were unconstitutional.² These sections imposed various consent, notification, and reporting requirements on individuals either seeking or providing abortions. As a threshold matter, the Third Circuit sought to determine the appropriate standard of review for abortion regulations. In *Roe v. Wade* and subsequent abortion decisions, the Supreme Court indicated that such regulations would be subject to strict scrutiny; that is, they would be upheld only if they were necessary to satisfy a compelling governmental interest.³ However, the Court's decisions in *Webster v. Reproductive Health Services* and *Hodgson v. Minnesota*, two abortion cases from 1989 and 1990 respectively, suggested that a new standard of review should be used by the lower courts.⁴

¹ Although Judge Alito authored the opinion of the court in two cases involving abortion and asylum applications, he does not appear to have authored the court's opinion in any substantive abortion case. See *Zhang v. Gonzales*, 405 F.3d 150 (3rd Cir. 2005) (records corroborating alien's claim of forced abortion cannot be excluded based solely on alien's failure to comply with Immigration and Naturalization Service regulation); *Chen v. Ashcroft*, 381 F.3d 221 (3rd Cir. 2004) (Board of Immigration Appeals' determination not to extend the statutory asylum protection afforded to women undergoing forced abortions to an unmarried partner was reasonable).

² 947 F.2d 682 (3rd Cir. 1991).

³ For a discussion on *Roe v. Wade* and the U.S. Supreme Court's other abortion decisions, see CRS Issue Brief IB95095, *Abortion: Legislative Response*, by Karen J. Lewis and Jon O. Shimabukuro.

⁴ 492 U.S. 490 (1989); 497 U.S. 417 (1990).

After reviewing *Webster* and *Hodgson*, the Third Circuit concluded that it would be improper to apply strict scrutiny to the state regulations. Instead, the court determined that the appropriate standard of review was one that sought to determine whether an abortion regulation imposes an undue burden on a woman's ability to have an abortion. This so-called "undue burden" standard had been discussed in Justice O'Connor's opinions in the two cases. *Webster* and *Hodgson* produced splintered decisions in which multiple opinions were written. However, Justice O'Connor's opinions were controlling because she concurred in the judgment on the narrowest grounds. Citing *Marks v. United States*,⁵ a 1977 case involving a statute that barred the interstate transportation of obscene materials, the Third Circuit explained: "*Marks* stands for a[n] important proposition: the controlling opinion in a splintered decision is that of the Justice or Justices who concur on the 'narrowest grounds.'"⁶

Applying the undue burden standard to the relevant sections of the Pennsylvania statute, the Third Circuit concluded that the provisions requiring informed and parental consent, and those imposing reporting requirements on abortion providers and facilities were permissible. However, the court determined that the spousal notification requirement did impose an undue burden on a woman's ability to have an abortion. The Third Circuit maintained that there was a "realistic likelihood" that a spouse could either prevent an abortion or cause serious physical or psychological trauma for the pregnant woman if notification was required.⁷

In a separate opinion, Judge Alito concurred in the court's judgment except with respect to the spousal consent requirement. Judge Alito agreed with the majority's conclusion that the undue burden standard was the governing legal standard for evaluating abortion regulations. However, he did not believe that the spousal notification requirement imposed an undue burden on a woman's ability to have an abortion.

After examining Justice O'Connor's opinions in *Webster*, *Hodgson*, and other abortion cases in which she discussed the undue burden standard, Judge Alito concluded that "an undue burden may not be established simply by showing that a law will have a heavy impact on a few women . . . instead a broader inhibiting effect must be shown."⁸ Judge Alito maintained that the plaintiffs in *Casey* did not prove that the spousal notification requirement would impose an undue burden: "Clearly the plaintiffs did not substantiate the impact of [the requirement] with the degree of analytical rigor that should be demanded before striking down a state statute."⁹

⁵ 430 U.S. 188 (1977).

⁶ *Casey*, 947 F.2d at 693.

⁷ *Casey*, 947 F.2d at 711.

⁸ *Casey*, 947 F.2d at 721.

⁹ *Casey*, 947 F.2d at 722.

In 1992, a plurality of the Supreme Court affirmed the Third Circuit’s decision with respect to the spousal notification requirement.¹⁰ In a joint opinion, Justices O’Connor, Kennedy, and Souter, writing for the Court, opined that the spousal notification requirement is “likely to prevent a significant number of women from obtaining an abortion.”¹¹ The Court emphasized that the requirement

does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.¹²

Publicly-Funded Abortions

In *Elizabeth Blackwell Health Center for Women v. Knoll*, the Third Circuit considered a challenge to Pennsylvania’s reporting and physician certification requirements for publicly-funded abortions under the Medicaid program.¹³ The Elizabeth Blackwell Center for Women, a reproductive healthcare facility that provides abortions, and two other abortion organizations challenged the requirements on the grounds that they were inconsistent with the so-called “Hyde Amendment,” and thus invalid under the Supremacy Clause of the U.S. Constitution.¹⁴

The Hyde Amendment prohibits federal reimbursement for abortions except in limited circumstances, such as when a pregnancy is the result of rape or incest, or when the procedure is necessary to save the life of the mother.¹⁵ Federal regulations and other agency directives for the implementation of the Medicaid program further explain that federal funds are available for certain abortions:

As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition, Congress . . . added abortions for pregnancies

¹⁰ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). For a discussion on the U.S. Supreme Court’s decision in *Casey*, see Lewis and Shimabukuro, *supra* note 3.

¹¹ *Casey*, 505 U.S. at 893.

¹² *Casey*, 505 U.S. at 893-94.

¹³ 61 F.3d 170 (3rd Cir. 1995).

¹⁴ See U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

¹⁵ See *Knoll*, 61 F.3d at 173.

resulting from rape and incest to the category of medically necessary abortions for which funding is provided.¹⁶

Pennsylvania law prohibited the use of federal or state funds for the termination of pregnancies caused by rape or incest unless (1) a statement was obtained from the physician performing the abortion that confirmed that the woman was a victim of rape or incest and that she personally reported the crime to the appropriate law enforcement agency together with the name of the offender; (2) the woman's signed statement to that effect was obtained from the physician; and (3) the appropriate state agency verified the reporting of the crime with the law enforcement agency.¹⁷ These requirements could not be waived. In addition, in cases where the life of the mother would be jeopardized if an abortion was not performed, Pennsylvania law required an independent physician who would not perform the procedure and who had no financial interest in the termination to certify the potential harm to the mother before federal or state funds could be expended.¹⁸

The Third Circuit invalidated the reporting and physician certification requirements on the grounds that they were inconsistent with the Hyde Amendment and the agency's interpretation of the Amendment. The court observed that the Hyde Amendment "plainly puts participating states on notice of their obligations" to fund certain abortions: "the Commonwealth was given clear notice that, if it elected to continue to participate in the Medicaid program, it was obligated to provide funding for such abortions."¹⁹ Moreover, the Third Circuit stated that "any participating state should have realized that reporting requirements could be so onerous as to defeat Congress's intent that Medicaid funding be provided for the categories of abortions in question."²⁰

Judge Alito joined the majority in *Knoll*.

Claims Based on Fetal Death

In *Alexander v. Whitman*, the Third Circuit upheld the dismissal of a complaint challenging the constitutionality of New Jersey's Wrongful Death Act and Survival Action Act.²¹ Alexander alleged that the two statutes were unconstitutional because they denied recovery on behalf of stillborn fetuses in violation of the Equal Protection and Due Process clauses of the Fourteenth Amendment of the U.S. Constitution.²² She argued that her stillborn child was a "person" who was denied

¹⁶ *Knoll*, 61 F.3d at 174 (quoting December 28, 1993 directive to state Medicaid directors from the Health Care Financing Administration).

¹⁷ *Knoll*, 61 F.3d at 175.

¹⁸ *Knoll*, 61 F.3d at 175-76.

¹⁹ *Knoll*, 61 F.3d at 177.

²⁰ *Knoll*, 61 F.3d at 178.

²¹ 114 F.3d 1392 (3rd Cir. 1997).

²² See U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall (continued...)

equal protection of the law because wrongful death and survival actions could not be maintained on behalf of stillborn children. Under New Jersey law, however, such actions could be brought on behalf of children who were injured prenatally, were born, and then died as a result of the prenatal injury.

The Third Circuit refused to recognize Alexander's equal protection claim. Citing the Court's analysis in *Roe*, the Third Circuit reiterated that "'the word 'person,' as used in the Fourteenth Amendment does not include the unborn.'"²³ The court stated: "Since the unborn are not persons within the meaning of the Fourteenth Amendment, no claim alleging an equal protection violation can be brought on behalf of the stillborn child."²⁴

Alexander's due process claim was premised on the notion that her relationship with her unborn child during pregnancy was a fundamental interest that would require the application of strict scrutiny to any statute that attempted to impact that relationship.²⁵ The court declined to consider whether a mother's relationship with her unborn child during pregnancy is a fundamental interest because it believed that the statutes at issue did not affect Alexander's relationship with her unborn child. The Third Circuit explained: "A mother's relationship with her fetus is exactly the same whether or not she can bring a wrongful death or survivor action. It is not the relationship that is affected here, it is the ability to recover for the loss of that relationship."²⁶

Although the court did not subject the wrongful death and survival action statutes to strict scrutiny, it did review the statutes under rational basis review, a less rigorous standard of review that evaluates whether a measure is rationally related to a legitimate state interest. Under that standard, the two statutes were easily upheld.

In a separate opinion, Judge Alito concurred in the court's judgment, but made two points. First, he expressed concern over the possible suggestion that there could be "human beings" who are not "constitutional persons."²⁷ Second, Judge Alito asserted that the doctrine of substantive due process must be informed by history. He

²² (...continued)

. . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

²³ *Alexander*, 114 F.3d at 1400 (quoting *Roe v. Wade*, 410 U.S. 113, 158 (1973)).

²⁴ *Id.*

²⁵ See *Alexander*, 114 F.3d at 1402-04. The Due Process Clause of the Fourteenth Amendment requires that the government follow appropriate procedures when it seeks to deprive any person of life, liberty, or property. In addition, courts have recognized a substantive component of the Due Process Clause that guarantees protection for certain rights or interests that have been found to be fundamental. When fundamental rights or interests are involved, a state regulation limiting these rights or interests can be justified only by a compelling state interest and only if they are narrowly tailored to satisfying that interest.

²⁶ *Alexander*, 114 F.3d at 1404.

²⁷ *Alexander*, 114 F.3d at 1409.

explained: “It is therefore significant that at the time of the adoption of the Fourteenth Amendment and for many years thereafter, the right to recover for injury to a stillborn child was not recognized.”²⁸

“Partial-Birth” Abortion

In *Planned Parenthood of Central New Jersey v. Farmer*, the Third Circuit considered the constitutionality of the New Jersey Partial-Birth Abortion Ban Act of 1997.²⁹ At the outset, the court’s opinion indicates that it was “in final form” before *Stenberg v. Carhart*, a case involving Nebraska’s partial-birth abortion measure, was argued before the U.S. Supreme Court.³⁰ The Third Circuit noted:

Because nothing in [the Supreme Court’s *Carhart*] opinion is at odds with this Court’s opinion; because, in many respects, that opinion confirms and supports this Court’s conclusions and, in other respects, goes both further than and not as far as, this opinion; and, because we see no reason for further delay, we issue this opinion without change.³¹

In a separate opinion, discussed later in this report, Judge Alito concurred in the judgment, but addressed the absence of any substantive discussion of *Carhart* in the court’s opinion.

The New Jersey statute at issue in *Farmer* prohibited the performance of “an abortion in which the person performing the abortion partially vaginally delivers a living human fetus before killing the fetus and completing the delivery.”³² The statute further defined the phrase “vaginally delivers a living human fetus before killing the fetus” to mean “deliberately and intentionally delivering into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure the physician or other health care professional knows will kill the fetus, and the subsequent killing of the human fetus.”³³ The statute included an exception that would have allowed the prohibited procedure to be performed to save the life of the mother, but did not include a similar exception to preserve the health of the mother.

The District Court invalidated the New Jersey statute, finding that it was unconstitutionally vague and imposed an undue burden on a woman’s ability to have an abortion. The Third Circuit affirmed the lower court’s decision on similar grounds. First, the Third Circuit agreed that the statute was unconstitutionally vague.

²⁸ *Id.*

²⁹ 220 F.3d 127 (3rd Cir. 2000).

³⁰ *Id.* at 130. For a discussion on *Stenberg v. Carhart*, see CRS Report RL30415, *Partial-Birth Abortion: Recent Developments in the Law*, by Jon O. Shimabukuro.

³¹ *Id.*

³² N.J. Stat. Ann. § 2A:65A-6(e).

³³ N.J. Stat. Ann. § 2A:65A-6(f).

The definition for the prohibited procedure was so broad that it encompassed almost all forms of abortion. For example, the court observed:

the term ‘partially vaginally delivers’ could reasonably describe the delivery of an intact fetus partially into the vaginal canal or the delivery of a fetal part into the vaginal canal. All abortion procedures, save the hysterotomy and hysterectomy which are typically not vaginal deliveries, could, therefore, be encompassed within this definition because during each of the procedures a fetus may be partially delivered into the vaginal canal and thereafter killed.³⁴

The court noted that it is constitutionally impermissible to force a physician to guess at the meaning of statutory language and risk losing a professional license and receiving a heavy fine if the individual guesses incorrectly.³⁵

Second, the Third Circuit determined that the New Jersey statute was unconstitutional because it imposed an undue burden on a woman’s ability to have an abortion. The court stated: “The Act erects a substantial obstacle because, as already discussed in great detail, it is so vague as to be easily construed to ban even the safest, most common and readily available conventional pre- and post-viability abortion procedures.”³⁶ Moreover, the court noted that the measure would discourage physicians from performing abortions because they would be unable to determine precisely what kind of abortion was banned, and would fear license revocation and fines.³⁷ Thus, a woman’s ability to have an abortion would be unduly burdened.

In his concurring opinion, Judge Alito discussed the absence of any substantive discussion of *Carhart* in the court’s opinion. He asserted that the responsibility of a lower court “is to follow and apply controlling Supreme Court precedent.”³⁸ Therefore, Judge Alito maintained that *Carhart* “compel[led] affirmance of the decision of the District Court,”³⁹ and contended that the court’s opinion “is now obsolete.”⁴⁰

Judge Alito’s discussion of precedent in his *Farmer* concurrence, and his examination and acknowledgment of the relevant Supreme Court cases in his *Casey* and *Alexander* opinions seem to suggest a recognition not only of the importance of precedent, but the appropriate role of the lower courts with regard to precedent. However, Judge Alito’s approach in these opinions may not provide an indication of how he might analyze cases as a Supreme Court Justice. Unlike lower courts, the

³⁴ *Farmer*, 220 F.3d at 136.

³⁵ *Farmer*, 220 F.3d at 137-38.

³⁶ *Farmer*, 220 F.3d at 144.

³⁷ *Farmer*, 220 F.3d at 145.

³⁸ *Farmer*, 220 F.3d at 152.

³⁹ *Farmer*, 220 F.3d at 153.

⁴⁰ *Farmer*, 220 F.3d at 152.

Supreme Court is free to change the standard or result from one of its earlier cases when it finds it to be “unsound in principle [or] unworkable in practice.”⁴¹

⁴¹ *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985).