

New York Court Watcher

Research & Commentary on the Supreme Court, the New York Court of Appeals, More

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SUNDAY, FEBRUARY 28, 2010

Justice Alito's Goat--What Gets It? (Part 3: Connecting the Dots)

Haiti

[Just to be clear: No, I'm not there. Just keeping it in mind. And while I'm at it, Chile, Indonesia, New Orleans, and wherever there is suffering that demands assistance and reminding.]

So let's put it together. Justice Samuel Alito's dissents. In the last 2 posts on **New York Court Watcher**, we discussed the value of dissenting opinions in providing insights about the author, and we looked at the last 10 dissents that Alito has written. (*See Justice Alito's Goat--What Gets It? (Part 1), Feb. 16, 2010; (Part 2: His Dissents), Feb. 22, 2010.*)

President Obama's State of the Union criticism of a Supreme Court decision got Alito's goat. Some of the Court's decisions have evoked criticism by Alito himself. They provoked him into writing dissenting opinions. Like Obama's remarks, they got his goat.

Here's a recap of those last 10 dissenting opinions of Alito that we looked at in the last post. They're out of chronological order and reorganized into some general subject matters. Connect the dots.

Death Sentence

Alito dissented when the Court ordered an evidentiary hearing to explore the misconduct between the jury and judge at the trial which resulted in the defendant's conviction and sentence to death. (*Wellons v. Hall* [2010].)

Alito dissented when the Court ordered a federal trial court to consider whether a death sentence was affected by the prosecution's unconstitutionally concealing mitigating evidence from the jury. (*Cone v. Bell* [2009].)

Police Search

Alito dissented when the Court ruled that a traffic stop did not automatically allow the police to search an automobile; there had to be some connection between the stop and the search, or some reason to suspect danger. (*AZ v. Gant* [2009].)

Alito dissented in 2 subsequent cases where the Court ordered the courts below to determine whether there was any connection between the offenses for which the defendants were arrested and the searches of their automobiles. (*Grooms v. U.S.* [2009] and *Megginson v. U.S.* [2009].)



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Confession

Alito dissented when the Court ruled that a confession obtained in the course of an unconstitutional detention--29 hours before presentment to a judge--was invalid and thus could not be used against the defendant. (*Corley v. U.S.* [2009].)

Double Jeopardy

Alito dissented when the Court ruled that a defendant could not be reprosecuted on the "hung jury" charges if the not-guilty verdicts necessarily meant not-guilty on those charges as well. (*Yeager v. U.S.* [2009].)

Immigration

Alito dissented when the Court stopped the deportation of a citizen of Cameroon, who claimed that he would be persecuted and tortured in his home country, until his request for asylum could be judicially evaluated. (*Nken v. Holder* [2009].)

Business

Alito dissented when the Court held that an employer who deliberately violated the rights of an injured worker was subject to punitive damages. (*Atlantic Sounding v. Townsend* [2009].)

Alito dissented when the Court ruled that a drug company was still liable under a state's law for failing to give warning about known risks, even if its label complied with FDA regulation. (*Wyeth v. Levine* [2009].)

Sooooooooo, in his dissenting opinions **Alito argued for:**

death sentences despite jury-judge misconduct that might have resulted in an unfair trial, and despite the unconstitutional hiding of mitigating evidence by the prosecution;

automobile searches despite no connection to the offense, and no reason to believe that evidence or weapons would be found;

confessions despite being obtained through unconstitutional detention;

reprosecution despite the jury having already decided not-guilty on an essential element of the crime charged;

deportation despite a request for asylum, based on persecution and torture, even before the opportunity for judicial review;

an employer despite its deliberate refusal to meet its legal obligations to an injured worker;

a drug company despite its failure to provide warnings about known risks in violation of state law.

Well that's it. Again, connect the dots.

Yes, Alito surely had reasons to take the positions he did in each of those 10 cases in which he authored dissents. Yes, there were arguments to be made against the Court's rulings in each of the cases. Yes, reasonable people could disagree in good faith in each of the cases.

To be sure, that is the very nature of most of the cases that get to the Supreme Court. They're tough. They're close. We might want to think otherwise in any particular case. We might convince ourselves that only one result makes any sense, is at all fair, can honestly be reached. But most cases that make it to the Supreme Court can probably be decided either way--as a matter of law, or policy, or equity, or any other acceptable basis. But....

BUT the choices made in these close cases are revealing. Precisely

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because they are close. Precisely because choices must be made. And oftentimes the choices made are of a kind. They reveal a pattern. They give insights into the person making the choices.

With dissenting opinions, the revelations and insights are heightened. Not only are choices made about how to vote in a particular case, but as we discussed previously, with a dissenting opinion a choice has been made to publicly disagree with a majority of one's colleagues, with the ruling of one's court. And to expend one's time and resources and collegial capital in the process. All to make a personal statement that the majority is so wrong and the issue is so important that I simply cannot go along or even reach a compromise.

So what about Alito's choices? His choices expressed in the dissenting opinions he wrote? Let's restate them once more. Bluntly.

That the Court should disregard the possibility of an unfair trial in one death penalty case, and the prosecution's unconstitutional concealment of mitigating evidence in another. That the Constitution permits police searches of automobiles anytime an automobile is stopped for any traffic infraction or for any other offense. That the Court should permit the prosecution to use a confession obtained unconstitutionally. That the government can re prosecute any "hung jury" charge, regardless of any related acquittals, without violating double jeopardy protection. That a foreign citizen should be deported before his claim for asylum has been judicially reviewed. That an employer that willfully violates its injured employees rights does not have to pay punitive damages. That a drug company that fails to warn consumers about its product's risks should not have to worry about state warning laws, as long as it has an FDA approved label.

Death sentences, searches, re prosecution, deportation, employer over injured worker, drug company over state law. Those were Alito's choices. And Supreme Court decisions that made a different choice generated an Alito dissent. Those decisions, those different choices, got Alito's goat.

Before closing, just consider this. What didn't get Alito's goat? What didn't he dissent against? What didn't he go public to protest?

Well, he didn't dissent against any discrimination. Not of any sort; not in any context. He didn't dissent against any violation of the rights of the accused. Not against an illegal search or seizure, or the ineffective assistance of counsel, or prosecutorial misconduct, or an unfair trial, or an illegal interrogation, or any other fundamental protection for criminal suspects or accuseds. He didn't dissent against any worker mistreatment. He didn't dissent against any corporate malfeasance. He didn't dissent against the inequitable treatment of immigrants.

Indeed, he didn't dissent against any injustice or inequity. Not one decision of the Supreme Court called for any such dissent? Well, none that got his goat.

As I said previously, I won't express an opinion. I don't think I have to. I certainly have an opinion, and it undoubtedly is apparent without my being explicit. Much more importantly, Alito's choices, his dissents, what gets his goat and what does not, express more than enough.

Connect the dots. The picture thus drawn is as stark as it is unflattering.

- Marshall_Thurgood
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- Saratoga Highlights

[Ok, yes, that's opinion. So let me add that I did originally support Alito's nomination. But I find him to be quite disappointing.]



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