

Court Nominee Has Paper Trail Businesses Like

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WASHINGTON, Nov. 4 - Judge [Samuel A. Alito Jr.](#) has reliably favored big-business litigants as he has pushed the federal appeals court in Philadelphia in a conservative direction.

His extensive paper trail of 15 years of opinions reveals a jurist deeply skeptical of claims against large corporations. A review of dozens of business cases in which Judge Alito has written majority or dissenting opinions or cast the decisive vote shows that, with few exceptions, he has sided with employers over employees in discrimination lawsuits and in favor of corporations over investors in securities fraud cases.



Carol T. Powers for The New York Times

Judge Samuel A. Alito Jr. at one of his numerous meetings on Capitol Hill this week on his nomination.

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Judge Alito, President Bush's choice to replace [Sandra Day O'Connor](#) on the Supreme Court, cast the decisive vote in a case involving a major steel company, and in another involving a large chemical maker, over environmentalists in pollution cases.

He has set aside punitive damages in some cases and reduced them in others; has handed down dissents that, if they became law, would impose higher burdens for workers to successfully sue their employers for discrimination; and has routinely upheld restrictive arbitration clauses that have limited the remedies available to plaintiffs. (In a rare instance of

setting aside an arbitration decision, he reversed an arbitration panel that had ordered the reinstatement of an intoxicated seaman on a moored oil tanker against the wishes of his employer, Exxon.)

In several cases, Judge Alito has found for the defendants facing accusations of antitrust violations, including one case in which he twice found in favor of a monopolist, 3M. (In that case, *LePage's v. 3M*, his view was rejected by a vote of 7-to-3 by the full circuit.) And by articulating a narrow view of the Commerce Clause of the Constitution, he is viewed as a judge who would be skeptical of the involvement of federal regulators in matters he views to be strictly within the province of state officials.

It is such business cases, which arise far more often than privacy and abortion cases, that are the bread and butter of the appeals courts and the Supreme Court. And, according to his supporters and detractors, it is where Judge Alito has left his mark in the United States Court of Appeals for the Third Circuit.

Judge Alito's record in business cases presents some political strengths and weaknesses as he heads into his confirmation hearing, scheduled to begin Jan. 9. Major business groups are preparing to spend millions of dollars to lobby on his behalf, and may help him with pivotal Democrats. Liberal groups, meanwhile, have begun to cite his record to make the case that he is insensitive to the plight of minorities and the environment.

The judge's reputation over the last 15 years was such that corporate lawyers relished the prospect of his participation in cases, while plaintiff's lawyers hoped to avoid him.

"We're always happy to see Judge Alito on the panel," said Robert C. Heim, the head of the litigation department at Dechert, a large law firm based in Philadelphia that represents some of the nation's largest corporations, typically facing accusations of antitrust, securities or corporate law violations. "He's generally a good judge for the cases we argue because we generally argue that the state of law does not favor the case that the plaintiffs are making and he's generally very receptive to that. He doesn't give an expansive reading to antitrust laws or securities laws."

Officials at the National Association of Manufacturers and the United States Chamber of Commerce said that as they combed through his record, they had been favorably impressed with what they had learned.

"He has come down on a host of issues in a way that the business community would prefer," said Robin Conrad, senior vice president of the National Chamber Litigation Center, the legal arm of the United States Chamber of Commerce, who has been researching Judge Alito's opinions. "This is not a guy who is going to go off the reservation."

Officials at the National Association of Manufacturers, which is also expected to endorse the nomination formally in the coming weeks, agreed.

"Judge Alito has a reputation for strict interpretation of the Constitution, and that stands him in good stead with us," said John Engler, the association's president and a former Republican governor of Michigan.

Lawyers for organizations often on the other end of lawsuits involving businesses are alarmed about Judge Alito's record.

"We're concerned, based on his record, about what his appointment would mean for access to the courts by the people we represent," said Glenn Sugameli, senior litigation counsel at Earthjustice, a law firm that represents environmental groups and individuals seeking enforcement of environmental laws. "We're also concerned, based on his record, that his interpretation of the Commerce Clause threatens the enforcement of such laws as the Clean Air Act, the Clean Water Act and the Endangered Species Act."

To be sure, in a small handful of instances the judge has ruled against the interests of business. In 1991, a year after he got to the bench, for instance, he issued a dissent in which he ruled that foreign seamen on American-flag ships should be covered by the minimum wage provision of the Fair Labor Standards Act. And in a dissent from a 2000 decision, he interpreted the statute-of-limitations provision of a race discrimination law to the benefit of the plaintiff in an employment case. In a third case, he voted with two other judges to dismiss an industry challenge to tougher environmental law standards in coal mining.

But those three cases, *Cruz v. Chesapeake Shipping*, *Zubi v. AT&T*, and *Pennsylvania Coal Association v. Bruce Babbitt*, are considered by both supporters and critics to be exceptions.

Cases favoring the defendant companies, like *Sheridan v. E.I. du Pont de Nemours* and *Bray v. Marriott Hotels* are far more prevalent. In *Sheridan*, 12 judges on the Third Circuit said that a hotel employee, Barbara Sheridan, had provided enough evidence of sex discrimination to permit her lawsuit to proceed to trial. Judge Alito, the sole dissenter in the case, would have made it easier for a defendant to rebut claims such as the one brought by Ms. Sheridan.

Similarly, Judge Alito found himself in dissent in *Bray*, another case involving a hotel worker making a claim of discrimination. The majority opinion sharply criticized Judge Alito's dissent, saying it "would immunize an employer from the reach of Title VII if the employer's belief that it had selected the 'best' candidate, was the result of conscious racial bias."

In securities law cases, Judge Alito has taken a similarly dim view of some of the lawsuits brought by investors. In one case, *In Re Burlington Coat Factory*, for instance, investors filed a securities fraud suit after the company's stock dropped precipitously following poor earnings that came after favorable projections by company executives.

Dismissing the case in part on the grounds that it failed to satisfy Rule 9 (b) of the Federal Rules of Civil Procedure, which governs pleading requirements in fraud cases, Judge Alito wrote: "To allow plaintiffs and their attorneys to subject companies to wasteful litigation based on the detection of a few negligently made errors found subsequent to a drop in stock price would be contrary to the goals of Rule 9 (b), which include the deterrence of frivolous litigation based on accusations that could hurt the reputations of those being attacked."

In environmental law, Judge Alito has generally also followed a narrow reading of the law. He cast a deciding vote in a 1997 case, *Public Interest Research Group v. Magnesium Elektron*, which dismissed a \$2.6 million fine against the company for violating the Clean Water Act and found that the public interest group did not have the authority to bring a lawsuit. In other environmental cases, like *W.R. Grace v. E.P.A.*, and *United States v. Allegheny Ludlum*, he has sided with large corporations seeking to overturn fines and remedial actions ordered by the Environmental Protection Agency.