

## Alito Emerges as Key Voice on Free Speech

By Peter G. Verniero

In last week's "Bong Hits" student free-speech decision by the U.S. Supreme Court, the real news was the separate opinion filed by Justice Samuel Alito Jr.

The court held, by a 5-4 vote, that school officials could regulate messages deemed to be encouraging illegal drug use. Although Alito joined the majority opinion, he wrote separately to make clear that the court can't count on his being the fifth vote to limit other forms of student expression. As he put it, free-speech regulations directed at illicit drugs stand "at the far reaches of what the First Amendment permits."

Alito is now a swing vote on First Amendment issues.

The case -- *Morse vs. Frederick* -- started when a high school student displayed "Bong Hits 4 Jesus" on a banner at a school-supported event in Juneau, Alaska. The school's principal seized the banner, believing that it contained a message promoting marijuana use in violation of school policy. The principal also suspended the student for 10 days. The student sued, claiming damages against school officials for suppressing his First Amendment rights.

Almost from the beginning, the case challenged conventional wisdom, drawing an unusual alliance of conservative and liberal groups that urged the court to back the student. Alito did not hand free-speech advocates the ruling that some had hoped for, but nor did he support the broad authority sought by school officials to suppress any student expression that might interfere with a school's mission. To the contrary, he warned that such authority could "easily be manipulated in dangerous ways, and I would reject it before such abuse occurs."

Those of us familiar with Alito's prior service on the 3rd U.S. Circuit Court of Appeals are not surprised by the strength of his free-speech leanings. While a circuit court judge, he wrote an opinion invalidating a Pennsylvania school district's policy that sought to prohibit speech on topics that might have involved the speaker's view of morality. The policy, Alito explained at the time, "strikes at the heart of moral and political discourse -- the lifeblood of constitutional self-government (and democratic education) and the core concern of the First Amendment."

He repeated that sentiment last week. He wrote that the court could not empower school officials to limit speech considered inconsistent with a school's mission without striking "at the very heart of the First Amendment." Included in the realm of protected speech, he pointedly noted, would be statements "on any political or social issue," including any debate regarding legalization of marijuana for medicinal use or the war on drugs itself.

He also disagreed with the notion often heard in school cases that school officials stand in the shoes of parents when regulating student conduct. That notion is sometimes used to justify empowering officials to curtail certain rights of students, much like a parent is permitted to do. Not so, says Alito. Instead, it "is a dangerous fiction to pretend that parents simply delegate their authority -- including their authority to determine what their children may say and hear -- to public school authorities."

In other words, Alito did not favor the free-speech regulation in the case to empower school officials to the same degree as parents. He did so, rather, solely in response to the "grave and in many ways unique threat to the physical safety of students" posed by illegal drugs. Alito is sending a not-so-subtle signal that he would be unreceptive to any further limitations on student speech.

The "Bong Hits" case, therefore, is not a green light for school personnel to suppress student expressions at will. At most it's a yellow light, due to the cautionary language of the Alito concurrence, which one other court member joined. The case runs counter to the concern expressed by some that if seated on the high court, Alito would be quick to empower government officials at the expense of our freedoms. Insofar as free-speech rights are concerned, he clearly eased that concern with his opinion in *Morse*. It will not be the last time, I predict.

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