

The entry way into Alito's judicial soul

Susan Pace Hamill

On February 13, 2007, at the University of Alabama School of Law, amidst much pomp and circumstance, U.S. Supreme Court Justice Samuel A. Alito Jr., delivered the Albritton Lecture, which honors five generations of the Albritton family of Andalusia. Justice Alito's topic "The History of Oral Arguments Before the Supreme Court" was undoubtedly very interesting and informative to the law students, professors and others who closely follow the Supreme Court.

But of what possible relevance is this lecture, or for that matter Justice Alito himself, to the average hard working Alabamian?

The nine justices of the U.S. Supreme Court have the last word on the most important legal issues. For example *Brown v. Board of Education*, which declared laws requiring blacks and whites to attend separate schools unconstitutional, is now almost uniformly accepted. However in 1954 when the Supreme Court handed down this decision a majority of Americans (most white people in 1954) disagreed and some reacted with intense hostility and violence. The U.S. Supreme Court probably has more influence in interpreting the scope of our fundamental rights than any other branch of government.

Many who believe that our laws should especially guard the fundamental rights of people who have been historically oppressed greeted Justice Alito's 2005 nomination with despair. After the announcement I overheard a crowd calling him "Justice Scalito", predicting that he would routinely vote with Justice Scalia and restrict legal remedies for blacks, women and the poor. If this label is true Justice Alito's presence on the Supreme Court is not good news for the average hard working Alabamian of any race or gender.

Although Justice Alito's record on the Third Circuit Court of Appeals suggests that these concerns are not without some merit, my experience at the lecture convinced me that this label is unfair.

Birmingham native and former Washington DC lawyer Chuck Cooper introduced Justice Alito by relaying stories of a twenty-five year friendship that included serving together in high government positions. In describing the "clash of certainties rather than analytical integrity" between liberal lawyers appointed by the Carter Administration and conservative lawyers appointed by the Reagan Administration, after first admitting that he was of the Reagan camp, Judge Cooper described Justice Alito (referring to him as "Sam") as one of the few who was "intellectually honest, listened well and genuinely aware of his own capacity to be mistaken".

At the reception, where I had a chance to speak to Justice Alito one-on-one and probe him about his judicial philosophy (my polite way of asking him to address the "Justice Scalito" label without directly putting it that way) he stated that judges should not be a substitute for the legislature and that he believes in the rule of law. However Justice Alito acknowledged that it is "not always easy to tell" what the rule of law really means.

Justice Alito's lecture itself indicates he cannot be mechanically predicted. Using slides of famous historical figures, including the late Justice Thurgood Marshall who presented the oral argument for *Brown* years before being appointed to the Supreme Court, along side amusing images and clips from recent oral arguments that drew laughter from the crowd, Justice Alito took us through the history of oral arguments before the Supreme Court in a manner that left his audience sure that he would make a case that oral arguments serve no useful purpose and should be eliminated.

But he came to the opposite conclusion. Justice Alito's two reasons why oral argument must stay should provide some comfort to those who fear him. First Justice Alito stated that oral argument is the only opportunity the public has to "engage in a personal way" the work of the Supreme Court. Without it the Supreme Court becomes "faceless" behind a "very imposing marble building".

Finally Justice's Alito's statements that "most cases are hard with good arguments on both sides" and a "case well argued by first rate advocates...remains an important step...a true complement... in the decision making process...that no written submission can serve" reveals that he will truly exercise his own independent legal judgement rather than blindly follow a specified ideology.

Constitution law scholars acknowledge that the oral argument in *Brown*, including the late Justice Marshall brilliantly illustrating with white and black baby dolls the inherent inequality of "separate but equal", was an important part of convincing the Supreme Court in 1954 that the true meaning of the rule of law embodied in the U.S. Constitution really does not allow "separate but equal" schools for blacks and whites.

Despite the volume of written material about Justice Alito, his lecture as well as the oral statements made about him, and, by him to me personally provide hope that he will with an open mind seek to discover the true meaning of the rule of law in the hard cases that preserves the constitutional protections that all Americans, especially the most vulnerable, deserve.

Susan Pace Hamill, a Professor of Law at the University of Alabama School of Law, can be reached at shamill@law.ua.edu