# FEDERALLY SPEAKING

by Barry J. Lipson

**Special Award Issue**

Welcome to ***Federally Speaking***, an editorial column for **ALL** interested in the **Federal Scene**, originally compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening in the Federal arena, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a "heads ups" to Federal CLE opportunities, or other Federal legal and related occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is a **Special Award Issue** of this column, and together with prior columns is available on the website of the U.S. District Court for the Western District of Pennsylvania: http://www.pawd.uscourts.gov/Pages/federallyspeaking.htm **.**

## LIBERTY'S CORNER

## The Honorable Samuel A. Alito, Jr.

It was quite a turn-on to hear ones written words adopted by a Justice of the United States Supreme Court, which were in turn reporting the words spoken to your columnist by an "exemplary" and "graciousness" jurist, words that told us "enough was enough," to wit, the "Honorable Carol Los Mansmann … recommended that judges be ***ineligible*** for the coveted FBA [Western Pennsylvania] ***Federal Lawyer of the Year Award***, as they **'already have enough recognition'**" (***Federally Speaking,*** No. 14, April 2002). In choosing this as an example of U.S. Circuit Judge Mansmann's character and graciousness, Justice Samuel A. Alito, Jr., gave us an interesting insight into his own character and graciousness, especially as he was here in Pittsburgh at the well turned-out **Second Carol Los Mansmann Distinguished Public Service Award Ceremony** to receive this **Special Award** from Duquesne University, the Western Pennsylvania Chapter of the Federal Bar Association and the Allegheny County Bar Association, which is awarded for ***"unique and outstanding contributions to the legal profession through diligence, dedication to principle, and commitment to the profession's highest standards."***

## First & Second Awards

There were distinct differences between the First and Second Award Ceremonies, both commendable, and not just attributable to the passage of six tempestuous years. While at the first Award Ceremony on September 21, 2001, merely ten days after 9/11, Judge Mansmann was still alive and personally present, and the first Awardee, U.S. Supreme Court Justice Sandra Day O'Connor, very appropriately voiced glowing remarks about her, Carol herself was not introduced to the 1000-plus attendees until yours truly deviated from the script and "ad libbed" an appreciated introduction of "Her Honor" to the assembled admiring multitudes, right before your "columnist had the honor of presenting" Justice O'Connor "with this award and 'pinning' the 'Honorable' Honorary FBA Member O'Connor with an FBA recognition pin" (***Federally Speaking*** No. 9, November 2001). Clearly Justice O'Connor was the sole center of attention and she delivered a most important immediately post-9/11 message, to wit: "'Where law ends, tyranny begins,' so said United States Supreme Court Justice Sandra Day O'Connor, quoting Margaret Thatcher … She was driving home the point that in light of the recent terrorist attacks the rule of law

must be maintained. 'The need for lawyers does not diminish in times of crisis,' she stressed, 'it only increases'" (***Ibid***.).

Conversely, at the second Award Ceremony it was Justice Alito's granted wish that the lion's share of the program be devoted to honoring the pride of the "pride" of the Third Circuit, Judge Mansmann. It was clear that he was really much more interested in honoring his long-time colleague on the U.S. Court of Appeals for the Third Circuit, Carol Los Mansmann, then in receiving personal honors himself. Indeed, later on at a private dinner, but for his deep respect and affection for Carol, he seemed more thrilled to receive the famous Pittsburgh "Terrible Towel," than the elegant crystal vase that represented the "Award in Chief," advising us that while his baseball loyalties were inextricably tied to the ill-fated Phillies, his football loyalties were up for grabs and the winning Steelers were definitely in the running. That day he shared with us his remembrances of how warmly Carol had welcomed him to the Third Circuit Bench, even providing him with detailed plans on how to organize his Chambers, plans that he is still utilizing at the High Court to this day.

Then too, the first Awardee, who had been unanimously confirmed by the U.S. Senate exactly twenty years earlier on September 21, 1981, was at that time a seasoned Supreme Court Justice, having proven herself on the High Court Bench and having judicially matured under the influence of "the **'Middlizer,'** the ***great equalizer*** of modern times. … ***The Great Middlizer,*** the saving grace of our Democracy, our Republic … that seemingly irresistible force that tends to mitigate extremes in … the Judiciary, whether they be Democrat or Republican controlled, and propels those occupying such positions towards the ***middle of the road***.... Why? [Larry J.] Sabato [Director of the University of Virginia Center for Politics] speculates, 'lifetime tenure with no retirement age means total independence from effective pressure of any kind. The 'reward system' ***on*** the Court is very different from the system prevailing in a nomination battle. During the nomination phase, strict adherence to the ideology of your side -- at least in appearances -- is essential. Once the black robes are donned, the approval of society's elites, including editorial and academic praise, is highly prized by most Justices'." (***Federally Speaking***, No. 45, October 2005). Even Chief Justice John G. Roberts, Jr., in his short tenure on the High Court seems open to ***"middlization***" as he now advises he understands "how admired America's Independent Judiciary is by foreign jurists; "that an "independent judiciary is one of the keys to safeguarding the rule of law;" and the necessity of "fulfilling the framers' vision of a society governed by the rule of law" (***Federally Speaking, No***. 49, November 2006).

On the other hand, the second Awardee is the very junior member of the U.S. Supreme Court, having been confirmed on January 31, 2006 by a U.S Senate divided 58-42, mostly along party lines. As of yet he has no real High Court track record, though on his first day on the High Court Bench he did break with the Court's conservatives (including fellow Bush appointee Chief Justice Roberts), and joined with the majority to refuse Missouri's "eleventh-hour" request to permit their midnight execution of Michael Taylor. So far in his ***de minimis*** fourteen decisions he has voted with the majority over 70% of the time. His confirmation was quite contentious (though only his wife, Martha-Ann Alito, alluded to this at the program), and his opponents had even drawn ammunition against him from the fact that "judicial centrist," the "late Judge Carol Los Mansmann, vigorously dissented" from Alito's "2-1 decision to overturn an Environmental Protection Agency [EPA] emergency cleanup order under the Safe Drinking Water Act [SDWA]. In ***W.R. Grace v. EPA***, 261 F.3d 330 (3d Cir. 2001)," where she cautioned that the "Courts should not undermine the will of Congress by withholding relief," stressing that "the high degree of deference we are to accord the EPA is a cornerstone to the EPA's power, enshrined in the SDWA, 'to protect the public, health, the environment, and public water supplies from the pernicious effects of toxic wastes.'" Even ***Federally Speaking,*** while being somewhat upbeat with regard to Chief Justice Roberts, seemly dejectedly commented that regarding "Justice Alito, we must rely on the 'Great Middlizer,' the great equalizer of modern times, that seemingly irresistible force that tends to mitigate

extremes in the Presidency and the Judiciary, whether they be Democrat or Republican controlled, and propels those occupying such positions towards the middle of the road" (***Federally Speaking***, No. 47, March 2006; & No. 49, November 2006).

## Justice Alito, the Man

Still, having listened and spoken to "His Honor," Justice Alito, he does seem to honor justice, and exhibits a genuine humility and judicial temperament. His selfless desire to honor Judge Mansmann over himself clearly demonstrates his humility; and his description of his decisional thought process, his judicial temperament. He persuasively painted a picture of his internal deliberations as fair and open minded. He advised that when he and a colleague have differences in their proposed opinions he will try to place himself in his colleague's mind and try to understand the disputed issues from his colleague's point of view, placing aside any preconceived notions he may have. As Bruce Solomon, losing counsel in ***Abramson v. William Paterson College of New Jersey***, 260 F.3d 265 (3d Cir. 2001), advised, in his personal opinion "Alito 'is a thoughtful jurist, he's got a good judicial demeanor, and he is intelligent. He has dealt with constitutional issues for the whole time he has been on the bench. … [W]hether he ruled against me in a particular case or not, I felt that he didn't come in with a preconceived notion. He looked at the law, and the chips fell where they may'" (Weiner, ***New Jersey Jewish News***, November 17, 2005).

## Justice Alito, the Jurist

Also an examination of his Third Circuit opinions exhibits that while he is a conservative jurist, he is not one dimensional or always predictable. In ***Abramson,*** supporting the **Free Exercise of Religion Clause,** Alito opined "a reasonable trier of fact could infer that officials of the college intentionally pressured the plaintiff to violate the dictates of her faith in order to keep her job," and workplace discrimination law "does not permit an employer to manipulate job requirements for the purpose of putting an employee to the 'cruel choice' between religion and employment." But Justice Alito appears "weak" on the **Establishment of Religion Clause,** according to People for the American Way, citing to ***ACLU v. Black Horse Pike Regional Board of Education***, 84 F.3d 1471 (3d Cir. 1996) (en banc), where the nine-judge majority held that the "prevalence of religious beliefs and imagery cannot erode the state's obligation to protect the entire spectrum of religious preferences from the most pious worshipper to the most committed atheist." Alito, however, joined the minority that would have held that the "Establishment Clause should not be read to prohibit activity which the Free Exercise Clause protects." In ***Black Horse*** the Third Circuit overturned the Board's decision permitting prayer at graduation based on a vote of the high school seniors, as this was "inconsistent with the First Amendment of the United States Constitution." To People for the American Way, "Alito's dissent suggests that the Judge believes in protecting 'the tyranny of the majority, which is precisely what the Bill of Rights intended to prevent'" (***New Jersey Jewish News***, supra.).

On abortion, the ***Los Angeles Times*** on November 14, 2005, examined Justice Alito's record and reported "that he has ruled on pro-life cases four times and he has ruled against pro-life positions three times. And the fourth was a split decision," advising that in ***Planned Parenthood v. Casey*** (3rd Cir. 1991) he "dissented from the ruling striking down a provision in the law that would have required married women seeking abortions to first notify their husbands;" in ***Elizabeth Blackwell Health Center for Women v. Knoll*** (3rd Cir. 1995) he "co-signed the majority opinion stating that a Pennsylvania regulation that would have required women to provide proof of alleged rape or incest or required a physician other than the one performing the procedure to certify that the woman's life was threatened in order for Medicaid to cover the cost of the abortion was contrary to federal policy;" in ***Alexander v. Whitman*** (3rd Cir. 1997) he joined in the "opinion that used ***Roe*** as precedent in denying a woman the right to sue for medical malpractice in the case of a stillbirth," writing that he was in "almost complete agreement with the court's opinion," and "adding that because stillborn fetuses were not covered under

the Bill of Rights when it was drafted, they are still not protected by them;" and in ***Planned Parenthood of Central New Jersey v. Farmer*** (3rd Cir. 2000) he "joined a decision applying the 2000 Supreme Court ruling in ***Stenberg v. Carhart*** -- which struck down a Nebraska law banning so-called 'partial-birth' abortions -- to strike down a similar New Jersey law."

And on diversity, in ***Sharon Taxman v. Board of Education*** (3rd Cir. 1996), Justice Alito joined the 8 to 4 majority in ruling against reverse discrimination in the firing of a white teacher to promote diversity, because Title VII of the Civil Rights Act has been violated where no history of racial discrimination or a manifest racial imbalance in the work force has been demonstrated. As Judge Mansmann, writing for the majority, made clear, the desire for diversity, however laudable, could not itself justify a teacher's firing because she is of a specific race, and here the Board admitted it did not insist on diversity "to remedy the effects of prior employment discrimination . . . or under representation of blacks within the Piscataway School District's teacher work force as a whole."

## The Charge

***"Where law ends, tyranny begins,"*** so proclaimed Justice Sandra Day O'Connor upon receiving the **First Mansmann Award.** "This view has again been reiterated by her in an apparently non-transcribed post-Supreme Court Georgetown University speech on March 10, 2006, where, following the New Year's Day 2004 lead of then sitting Conservative Republican U.S Supreme Court Chief Justice William Rehnquist who "bawled out Congress for enacting Sentencing Guidelines which impinged on judicial independence and could 'intimidate individual judges'" (see ***Federally Speaking,*** Numbers 36 & 44), she cautioned against current trends that 'challenge the independence of judges and the freedoms of all Americans' which could lead to a dictatorship here in the good 'ole U.S. of A," and reminded us that the "nation's founders wrote repeatedly … that ***without an independent judiciary to protect individual rights from the other branches of government those rights and privileges would amount to nothing***" (***Federally Speaking,*** No. 47, March 2006; see also Chief Justice Roberts, ***supra.***, an "independent judiciary is one of the keys to safeguarding the rule of law" ).

In accepting the Carol Los Mansmann Award for Distinguished Public Service, which should continue to inspire him to ***"unique and outstanding contributions to the legal profession through diligence, dedication to principle, and commitment to the profession's highest standards,"*** attributes exemplified by The Honorable Carol Los Mansmann, it is hoped that Justice Samuel A. Alito, Jr. will strongly support the independence of the judiciary, will be open to and embrace the beneficial affects of ***"middlization;"*** and will be a staunch guardian of the **Bill of Rights**.

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**This Column is dedicated to the preservation of the U.S. Constitution & the Bill of Rights.**

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