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## Immigration: Selected Opinions of Judge Samuel Alito



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## **Summary**

Judge Samuel Alito, President Bush's nominee to replace retiring Justice Sandra Day O'Connor as an associate justice on the Supreme Court, has been a judge for the U.S. Court of Appeals for the Third Circuit since 1990. This report discusses notable majority and dissenting opinions written by Judge Alito relating to immigration.

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# Immigration: Selected Opinions of Judge Samuel Alito

Judge Samuel Alito, President Bush's nominee to replace retiring Justice Sandra Day O'Connor as an associate justice on the Supreme Court, has been a judge on the U.S. Court of Appeals for the Third Circuit since 1990. During his tenure, Judge Alito has authored several majority and dissenting opinions concerning immigration matters governed by the Immigration and Nationality Act (INA),<sup>1</sup> particularly as they concern the deportation of aliens and asylum claims.

## Background

Immigration matters primarily come before federal appellate courts through petitions to review final orders of removal by the Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting and applying immigration laws.<sup>2</sup> Among other things, the BIA hears administrative appeals of rulings made by Immigration Judges (IJs) ordering aliens removed or denying applications for relief from removal. If the BIA upholds an order of removal against an alien, the alien may petition the court of appeals in the appropriate federal circuit to review the BIA's decision,<sup>3</sup> though in some cases such review may be very limited in scope.<sup>4</sup> Pursuant to statute and court jurisprudence, judicial review of BIA decisions is typically deferential, and the scope of such review is limited by statute to the administrative record upon which the order is based.<sup>5</sup> Perhaps accordingly, a substantial majority of BIA rulings reviewed by federal appellate courts are upheld.<sup>6</sup>

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<sup>1</sup> 8 U.S.C. § 1101, *et seq.*

<sup>2</sup> 8 U.S.C. § 1252. The BIA is a component of the Executive Office of Immigration Review (EOIR) within the Department of Justice.

<sup>3</sup> INA § 242; 8 U.S.C. § 1252.

<sup>4</sup> *See* INA § 242(a)(2)(B)-(D); 8 U.S.C. § 1252(a)(2)(B)-(D) (barring judicial review of denials of certain types of discretionary relief and orders of removal of certain categories of aliens, except when such review concerns constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with relevant statutory requirements).

<sup>5</sup> *See* INA § 242(b)(4); 8 U.S.C. § 1252(b)(4).

<sup>6</sup> The *New York Times* recently reported Deputy Assistant Attorney General Jonathan Cohn as estimating that the government won more than ninety percent of immigration cases before the federal appellate courts. Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1. The percentage of BIA decisions upheld by federal appellate courts varies from circuit to circuit. A November 2005 opinion by a  
(continued...)

## Review of BIA Decisions

In most cases where Judge Alito has reviewed BIA decisions, those decisions have been unanimously upheld by the court. However, when the court has split when deciding a case's outcome, Judge Alito has typically been on the dissenting side, voting to uphold a BIA decision that the majority votes to overturn.<sup>7</sup> Typically, Judge Alito dissents in such cases because he believes the majority has not been sufficiently deferential to the decisions of administrative authorities. On the other hand, Judge Alito has voted to remand some BIA decisions where potentially important documentation corroborating an alien's claims has been excluded without sufficient explanation.

## Review of Discretionary Judgments

Judge Alito has differed with some of his Third Circuit colleagues when evaluating certain BIA denials of discretionary relief. One such instance was *Tipu v. INS*,<sup>8</sup> a 1994 case where the BIA denied deportation relief to an alien ordered removed because of a decade-old drug conviction.<sup>9</sup> In a prior decision, the BIA had announced that in deciding whether to grant an alien relief from deportation, it would “balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf.”<sup>10</sup> The BIA's decision to deny discretionary relief to petitioner Tipu was evaluated by the three-judge Circuit panel under an abuse of discretion standard, meaning that the panel would not disturb the BIA's decision unless it was found to be “arbitrary, irrational, or contrary to law.”<sup>11</sup> Applying this standard, the majority vacated the BIA's decision after finding that the BIA had failed to adequately consider factors which weighed in Tipu's favor, including (1) the hardship such deportation would have upon Tipu's seriously ill, dependent brother and his brother's family; (2) Tipu's relatively minor role in the crime for which he had been convicted; (3) evidence that

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<sup>6</sup> (...continued)

Seventh Circuit panel noted that “[i]n the year ending on the date of the argument, different panels of this court reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits.” *Benslimane v. Gonzales*, No. 04-1339, 2005 WL 3193641 at \*1 (7<sup>th</sup> Cir. Nov. 30, 2005).

<sup>7</sup> According to recent *Washington Post* study, in immigration cases heard by Judge Alito where the judicial panel was split, Judge Alito voted with the majority 13% of the time. Amy Goldstein and Sarah Cohen, Alito, *In and Out of the Mainstream*, WASH. POST, Jan. 1, 2005, at A10 (accompanying chart).

<sup>8</sup> *Tipu v. INS*, 20 F.3d 580 (3<sup>rd</sup> Cir. 1994).

<sup>9</sup> Subsequent modifications to the INA have expanded the immigration consequences of drug-related criminal offenses, and would very likely bar aliens such as the petitioner in *Tipu* from being eligible for cancellation of their removal. For additional background, see CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia and Larry M. Eig.

<sup>10</sup> *Id.* at 583 (quoting *Matter of Marin*, 16 I & N Dec. 581, 584 (BIA 1978)).

<sup>11</sup> *Id.* at 582.

the Tipu had been rehabilitated; and (4) evidence of Tipu’s business ties to the U.S. through his ownership and operation of a taxi cab.

In his dissent, Judge Alito criticized the majority’s decision to vacate the BIA’s decision, arguing that it went “well beyond the limited scope of appellate review that we are permitted to exercise in a case like this.”<sup>12</sup> Concluding that the alien’s drug conviction could be properly considered by the BIA as a “serious adverse factor” against the alien’s application for relief from deportation,<sup>13</sup> Judge Alito went on to argue that:

Merely stating what the majority finds — that the BIA put too much ‘emphasis’ on one factor, failed to evaluate another factor as ‘outstanding’ rather than merely ‘favorable, and did not give ‘proper weight’ to a third factor — seems to me to demonstrate that the majority, in deed if not in word, has applied the wrong standard of review ... In this government of separated powers, it is not for the judiciary to usurp Congress’ grant of authority to the Attorney General by applying what approximates *de novo* appellate review.<sup>14</sup>

## Review of Adverse Credibility Findings

The INA provides that administrative findings of fact (which may include, among other things, findings regarding the credibility of a witness in an immigration hearing) “are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”<sup>15</sup> While Judge Alito has generally been in the majority in upholding adverse credibility findings affirmed by the BIA, in the case of *Dia v. Ashcroft*,<sup>16</sup> Judge Alito dissented from an *en banc* opinion which he believed accorded too little deference to an IJ’s credibility finding.

In *Dia*, the Third Circuit reviewed a BIA decision upholding an IJ’s denial of petitioner Dia’s asylum application. The IJ had rejected Dia’s application based on an adverse credibility finding: the IJ did not find credible Dia’s claim that Guinean military men destroyed his home and beat and raped his wife because of his refusal to join the military. The majority found that the IJ’s adverse credibility finding was based on conclusions that were “arbitrary and conjectural in nature.”<sup>17</sup> Among other things, the majority criticized the IJ’s reliance on “background knowledge” and personal experiences to reach conclusions about Dia’s credibility, finding that the inferences made by the IJ were “in some instances non sequiturs, and in others, counterintuitive.”<sup>18</sup> For example, the majority questioned the IJ’s disbelief of Dia’s claim that his wife had told him to flee Guinea without her after she had been beaten

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<sup>12</sup> *Id.* at 587 (Alito, J., dissenting).

<sup>13</sup> *Id.* (Alito, J., dissenting).

<sup>14</sup> *Id.* at 589 (Alito, J., dissenting) (internal citation and quotation marks omitted)

<sup>15</sup> INA § 242(b)(4)(B); 8 U.S.C. § 1252(b)(4)(B).

<sup>16</sup> *Dia v. Ashcroft*, 353 F.3d 228 (2003) (*en banc*).

<sup>17</sup> *Id.* at 250.

<sup>18</sup> *Id.* at 251.

and raped. The IJ concluded that it was highly unlikely that a wife would urge her husband to flee without her in such a situation, or that a husband would willingly do so. The majority characterized this conclusion by the IJ as “lack[ing] foundation in any logical reasoning or any support in the record.”<sup>19</sup>

In a dissent joined by two other judges, Judge Alito disputed several aspects of the majority opinion, including its skepticism about the inferences the IJ made on the basis of personal experience and background knowledge. Judge Alito argued that it was “entirely proper,” even in light of the admitted imperfections of such an approach, “for a fact finder to take into account ‘background knowledge’ about human behavior in assessing the plausibility of testimony.”<sup>20</sup> More broadly, Judge Alito argued that the majority had misapplied the INA’s “reasonable adjudicator” standard for judicial review of administrative findings of fact. According to Judge Alito, the majority had turned this standard “on its head ... [by finding] that aspects of Dia’s testimony should have been found to be credible because a reasonable person might have found them believable.”<sup>21</sup> For its part, the majority disputed this characterization and argued that Judge Alito’s reading of the “reasonable adjudicator” standard “not only guts the statutory standard, but ignores our precedent.”<sup>22</sup> The majority alleged that Judge Alito’s dissent disregarded precedent interpreting the INA’s “reasonable adjudicator” standard as requiring adverse credibility findings to be supported by “substantial evidence” in the record; a requirement that the majority argued permitted the reversal of adverse credibility findings when they appeared to be based on speculation, conjecture, or minor inconsistencies alone.<sup>23</sup>

## **Review of Adverse Credibility Findings when Corroborating Documents Have Been Excluded from the Record**

Judge Alito’s jurisprudence generally shows him to be deferential to factual conclusions reached by immigration tribunals. However, he reversed adverse credibility findings made after documents potentially corroborating an alien’s claims were excluded from consideration without sufficient explanation.

In the 2004 case of *Liu v. Ashcroft*,<sup>24</sup> a Third Circuit panel reviewed a BIA decision denying the asylum and withholding of deportation claims of a married Chinese couple who claimed persecution by the Chinese government via coercive population control measures. In a hearing before an IJ, the Lius attempted to submit documentary evidence indicating that the Chinese government forced Mrs. Liu to have two abortions. The IJ excluded these documents from consideration, however, because they were not authenticated by a U.S. Foreign Service Officer as was

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<sup>19</sup> *Id.* at 255.

<sup>20</sup> *Id.* at 262 (Alito., J., concurring in part and dissenting in part).

<sup>21</sup> *Id.* at 264 (Alito., J., concurring in part and dissenting in part).

<sup>22</sup> *Dia*, 353 F.3d at 251, n.22.

<sup>23</sup> *Id.*

<sup>24</sup> *Liu v. Ashcroft*, 372 F.3d 529 (3<sup>rd</sup> Cir. 2004).

seemingly required by a particular immigration regulation.<sup>25</sup> Absent consideration of these documents, the IJ denied the Lius' applications for relief from removal, finding that their testimony was not credible. The BIA affirmed the IJ's decision.

Subsequently, however, immigration authorities conceded that the authentication procedures described in the pertinent regulation were not mandatory, and that documents could be authenticated in ways other than those described in the regulation.<sup>26</sup> Writing for a unanimous panel, Judge Alito stated that although significant deference is owed to factual determinations made by the IJ and upheld by the BIA, "remand is appropriate where ... we have made a legal determination (e.g., regarding admissibility of evidence) that fundamentally upsets the balancing of facts and evidence upon which an agency's decision is based."<sup>27</sup> Because the regulation cited by the IJ did not provide an absolute rule of exclusion and was not the exclusive means of authenticating records in an immigration hearing, Judge Alito concluded that it was legal error for the IJ to reject the abortion certificates on that ground alone. Accordingly, the case was remanded back to the BIA for a determination of whether the documents presented by the Lius were genuine and should have been admitted into evidence.<sup>28</sup>

In a similar case in 2005, *Zhang v. Gonzales*,<sup>29</sup> Judge Alito wrote an opinion for a unanimous Circuit panel<sup>30</sup> remanding an asylum case when it was unclear whether the IJ had excluded documents that may have supported the petitioner's claim that she had been forced by the Chinese government to have an abortion. The opinion claimed that the IJ "obviously did not take the documents at face value," because if he did the documents would "powerfully corroborate" the petitioner's claims.<sup>31</sup> Judge Alito's opinion also cited the Court's prior holding in *Liu* that corroborating documents could not be excluded solely because of failure to comply with the relevant authentication regulation.<sup>32</sup> Accordingly, the Circuit panel vacated the BIA's decision and remanded the case to either determine the reasons the corroborating documents were excluded by the IJ, or if documents were admitted, to explain the finding that the petitioner's claim of persecution nonetheless lacked credibility.<sup>33</sup>

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<sup>25</sup> See 8 C.F.R. § 287.6.

<sup>26</sup> *Liu*, 372 F.3d at 532 (quoting from the government's brief).

<sup>27</sup> *Id.* at 534.

<sup>28</sup> *Id.*

<sup>29</sup> *Zhang v. Gonzales*, 405 F.3d 150 (2005).

<sup>30</sup> Although a judge on the panel wrote a concurring opinion, he also stated that he fully joined the majority's opinion. *Id.* at 157 (McKee, J., concurring).

<sup>31</sup> *Id.* at 154.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 157.



## Substantive Grounds for Asylum

A significant portion of immigration cases dealt with by Judge Alito have involved denials of applications for asylum. Asylum is a discretionary form of relief from removal available to an eligible alien who is unwilling to return to his or her native country because of a well-founded fear of persecution on account of one of five characteristics: (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, or (5) political opinion.<sup>34</sup> The INA specifies that forced abortion or sterilization pursuant to a coercive population control program or resistance to undergoing such forced procedures constitutes persecution on account of political opinion.<sup>35</sup>

Although a few Third Circuit opinions involving asylum claims have been discussed in other sections of this report, this section discusses some notable opinions by Judge Alito that have focused primarily on issues relating to the substantive grounds for asylum eligibility. At least two of the cases discussed below concern the BIA's interpretation of the INA's asylum eligibility provisions. In cases where congressional intent is unclear or ambiguous, federal courts give significant deference to the BIA's interpretation of the immigration laws it administers, so long as such interpretations are "based on a permissible construction of the [INA]." <sup>36</sup> This standard is commonly referred to as "*Chevron* deference" in reference to the Supreme Court case where the standard was formulated.<sup>37</sup>

### Gender-Based Persecution

One of Judge Alito's most publicized asylum opinions was in the 1993 case of *Fatin v. INS*,<sup>38</sup> where a unanimous Third Circuit panel upheld a BIA decision to deny asylum and other forms of relief from deportation to an Iranian woman who claimed a well-founded fear of persecution if she returned to Iran on account of her Westernized views on the rights of women.

The Circuit panel considered Fatin's argument that her status as a Westernized, Iranian woman opposed to her country's treatment of women constituted membership in a "particular social group" for asylum purposes. In addressing this argument,

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<sup>34</sup> 8 U.S.C. §§ 1101(a)(42), 1158.

<sup>35</sup> 8 U.S.C. § 1101(a)(42)(B). Section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, Division C, which amended the INA to specify that persecution on account of resistance to a coercive population control program constituted persecution on account of political opinion, also established an annual cap of 1,000 on the number of aliens who could be admitted into the U.S. as refugees or be granted asylum on account of persecution on such grounds. This cap was eliminated by the REAL ID Act of 2005. P.L. 109-13, Division B, § 101(g)(2).

<sup>36</sup> *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (*quoting* *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)); *see also* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-449 (1987).

<sup>37</sup> *Chevron*, 467 U.S. at 843.

<sup>38</sup> *Fatin v. INS*, 12 F.3d 1233 (3<sup>rd</sup> Cir. 1993).

Judge Alito examined the legislative history behind the INA’s use of the term “particular social group,” the term’s derivation from the 1967 United Nations Protocol Relating to the Status of Refugees (a treaty to which the U.S. is a party), and a prior BIA ruling defining “particular social group” to include persons who share a common, immutable characteristic such as sex.<sup>39</sup> Ultimately, Judge Alito concluded that the asylum eligibility category for members of a “particular social group” was broad enough to include women who were profoundly opposed to their country’s gender-specific restrictions upon them.<sup>40</sup> Despite finding that Fatin could qualify as a member of a “particular social group,” the Circuit panel nevertheless upheld the BIA’s conclusion that Fatin had not presented sufficient evidence demonstrating that she had a well-founded fear of ill treatment rising to the level of “persecution.”<sup>41</sup> Judge Alito’s opinion has been cited in numerous asylum claims involving persecution on account of gender,<sup>42</sup> and his interpretation of “particular social group” has been considered expansive by some commentators.

## **Distinction Between Asylum Claims Made By Married and Unmarried Partners**

A number of Judge Alito’s opinions have involved the review of asylum claims related to coercive population control practices employed by the Chinese government. One such opinion was in the case of *Chen v. Ashcroft*,<sup>43</sup> concerning a Chinese national’s claim for asylum on account of his fiancée’s forced abortion. In an earlier opinion, the BIA had held that the *spouse* of a person subjected to forced sterilization or abortion could be eligible for asylum on account of past persecution.<sup>44</sup> However, the BIA declined to extend the rule of asylum eligibility to unmarried partners in the present case. In a unanimous opinion written by Judge Alito, a three-judge panel upheld the BIA’s decision under the *Chevron* standard of deference, finding that it was reasonable for the BIA to limit asylum eligibility to spouses, as it “contributes to efficient administration and avoids difficult and problematic factual inquiries”<sup>45</sup> concerning the nature of the relationship between the partners. While noting that the “use of marital status as a proxy is undoubtedly both over- and

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<sup>39</sup> *Id.* at 1238-1240 (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985)).

<sup>40</sup> *See id.* at 1240-1242.

<sup>41</sup> The BIA had previously defined persecution as “threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom”; an interpretation deemed permissible by the Circuit panel. *Id.* at 1241-1243, n. 10. The Circuit panel found that the BIA’s conclusion that Fatin did not have a well-founded fear of persecution was supported by the administrative record. *Id.*

<sup>42</sup> E.g., *Yadegar-Sargis v. INS*, 297 F.3d 596, 603 n.5 (7<sup>th</sup> Cir. 2002); *Fisher v. INS*, 61 F.3d 1366, 1374 (9<sup>th</sup> Cir. 1994).

<sup>43</sup> *Chen v. Ashcroft*, 381 F.3d 221 (3<sup>rd</sup> Cir. 2004).

<sup>44</sup> *Matter of C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997) (*en banc*).

<sup>45</sup> *Chen*, 381 F.3d at 222.

under-inclusive to some extent,”<sup>46</sup> Judge Alito concluded that this over- and under-inclusiveness was not so great as to render the proxy irrational, noting additionally that marital status was a criterion for benefit eligibility in numerous fields of law including immigration, tax, welfare benefits, and property.<sup>47</sup>

## Persecution on the Basis of Political Opinion

As previously mentioned, one of the grounds for asylum is a well-founded fear of persecution on account of political opinion. In the 1997 case of *Chang v. INS*,<sup>48</sup> a three-judge Circuit panel reviewed the BIA’s denial of the asylum claim of an alien who had led a Chinese technical delegation to the U.S. and claimed he would be prosecuted for violating China’s security laws by remaining in the U.S. for an unauthorized period of time and failing to report suspicions that other delegates would not return to China. The IJ denied Chang’s application for asylum and the BIA affirmed, reasoning that because China’s security laws were laws of general applicability, Chang’s prosecution under such laws would not be persecution based on his political opinion. The panel majority overturned the BIA’s ruling, finding that the Chinese security laws were aimed at preventing political dissent, and that China’s prosecution of Chang would be on account of his political opinion.

Judge Alito disagreed, stating that while the case facts “arouse[d] considerable sympathy,” Chang had failed to demonstrate that his prosecution for violating the Chinese security law would be politically motivated, as he had “never specified any political opinion that he holds ... that is at odds with the Chinese government.”<sup>49</sup> The majority, in contrast, argued that evidence in the administrative record made it “reasonable to conclude that Chang was defying the orders of the Chinese government because he disagreed with the government policy behind them,” and that such defiance constituted political opinion.<sup>50</sup>

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<sup>46</sup> *Id.* at 227.

<sup>47</sup> *Id.* at 227 n.6.

<sup>48</sup> *Chang v. Ashcroft*, 119 F.3d 1055 (3<sup>rd</sup> Cir. 1997).

<sup>49</sup> *Id.* at 1068-1069 (Alito, J., dissenting).

<sup>50</sup> *Id.* at 1063 n.4.

## Interpretation of Immigration Statutes and Regulations

Occasionally when reviewing an immigration claim, a federal court will have to examine the meaning of an immigration statute or regulation, rather than simply reviewing their application to a particular set of facts. Judge Alito has generally read immigration statutes broadly, and in a few cases, his statutory readings have been broader than those of some of his Third Circuit colleagues. On one occasion, a position he took regarding the scope of an INA provision limiting federal judicial review was subsequently rejected by the Supreme Court in deciding a case from another Circuit. While Judge Alito has generally upheld immigration authorities' interpretation of applicable regulations, in limited cases he has found these interpretations impermissible.

### Tax Offenses as Aggravated Felonies

In the 2004 case of *Lee v. Ashcroft*,<sup>51</sup> a Third Circuit panel that included Judge Alito reviewed the deportation orders of a married couple convicted of filing a false tax return which caused a tax deficiency of over \$50,000. The BIA found that the aliens' convictions fell under the INA's definition of an "aggravated felony," and therefore constituted deportable offenses. Although the INA lists several crimes as aggravated felonies for deportation purposes, including an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds \$ 10,000," the only tax offense specifically listed as an aggravated felony is the separate crime of tax evasion.<sup>52</sup>

The majority overturned the BIA's orders of removal, finding that when Congress specified tax evasion as an aggravated felony, it clearly and unambiguously intended to designate it "as the only tax crime that is a removable offense."<sup>53</sup> Accordingly, the aliens' convictions for a tax crime other than tax evasion did not make them deportable. Judge Alito dissented, arguing that the aliens' tax offenses plainly constituted offenses involving fraud or deceit, and were therefore "aggravated felonies" making the aliens deportable. Judge Alito continued that Congress's decision to specify tax evasion as an aggravated felony "may have been ... simply to make certain - even at the risk of redundancy - that tax evasion qualifies as an aggravated felony. While good statutory draftsmanship seeks to avoid surplusage, other goals, such as certainty and the avoidance of litigation, are sometimes more important."<sup>54</sup> Responding to Judge Alito's dissent, the majority suggested that while Congress may indeed have wished for all tax offenses to potentially be considered

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<sup>51</sup> *Lee v. Ashcroft*, 368 F.3d 218 (3<sup>rd</sup> Cir. 2004).

<sup>52</sup> INA § § 101(a)(43)(M); 8 U.S.C. § 1101(a)(43)(M).

<sup>53</sup> *Lee*, 368 F.3d at 224.

<sup>54</sup> *Id.* at 226 (Alito, J., dissenting). Judge Alito further added that to the extent that the definition of aggravated felony was ambiguous, he would apply *Chevron* deference and defer to the BIA's "reasonable interpretation" that Lee's tax offense constituted an aggravated felony. *Id.* at 228 n.13 (Alito, J., dissenting).

aggravated felonies, “we must interpret what it has written by well-recognized rules of statutory construction,”<sup>55</sup> including maintaining the “longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.”<sup>56</sup>

## Habeas Review of Removal Decisions

In 1996, Congress made substantial modifications to the INA via the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>57</sup> and the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA),<sup>58</sup> including by restricting the availability of judicial review of removal orders. Among other things, former INA § 106(a)(g), which stated that “any alien held in custody pursuant to an order of deportation ... may obtain judicial review thereof by habeas corpus proceedings,”<sup>59</sup> was eliminated, and a new provision was added stating that final orders of deportation against certain categories of aliens would “not be subject to review by any court.”<sup>60</sup>

In the 1999 case of *Sandoval v. Reno*,<sup>61</sup> a three-judge Third Circuit panel was required to determine whether AEDPA and IIRIRA had eliminated court review of immigration decisions via habeas proceedings under 28 U.S.C. § 2241. The majority held that habeas review could not be stripped from federal courts absent the clear intent of Congress, and that AEDPA and IIRIRA did not express a sufficiently clear intent to strip the courts of habeas jurisdiction over immigration matters. In reaching this decision, the majority noted that the Supreme Court had “historically drawn a sharp distinction between ‘judicial review’ ... and the courts’ power to entertain petitions for writs of habeas corpus.”<sup>62</sup> The majority also noted that several Circuit Courts had previously reached the same conclusion that the 1996 amendments to the INA did not eliminate federal habeas review of immigration decisions.<sup>63</sup>

Dissenting from the majority’s conclusion that habeas jurisdiction remained over immigration claims, Judge Alito argued that congressional intent to eliminate federal habeas review was clear; noting, for example, that a pertinent section of AEDPA was entitled “Elimination of Custody Review by Habeas Corpus.”<sup>64</sup> He further cited to a Seventh Circuit opinion which had reached the same conclusion

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<sup>55</sup> *Id.* at 225 n.11.

<sup>56</sup> *Id.* at 225 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

<sup>57</sup> P.L. 104-132 (1996) [*hereinafter* “AEDPA”].

<sup>58</sup> P.L. 104-208, Division C (1996).

<sup>59</sup> 8 U.S.C. § 1105a(a)(10) (1995).

<sup>60</sup> AEDPA, § 440(a).

<sup>61</sup> *Sandoval v. Reno*, 166 F.3d 225 (3<sup>rd</sup> Cir. 1999).

<sup>62</sup> *Id.* at 235.

<sup>63</sup> *Id.* at 230 (citing *Goncalves v. Reno*, 144 F.3d 110 (1<sup>st</sup> Cir.1998); *Henderson v. INS*, 157 F.3d 106 (2<sup>nd</sup> Cir.1998); *Magana-Pizano v. INS*, 152 F.3d 1213 (9<sup>th</sup> Cir.1998) (*per curiam*)).

<sup>64</sup> *Id.* at 242 (Alito, J., concurring in part and dissenting in part).

regarding the elimination of habeas review.<sup>65</sup> Despite arguing that the 1996 amendments to the INA limited review under the federal habeas statute, Judge Alito nevertheless believed that “any judicial review to which [an alien] is constitutionally entitled can and should be provided by means of a petition for review filed in [the appropriate federal appellate] court.”<sup>66</sup> He further suggested that a prior Third Circuit opinion might need to be overruled so that the court could review certain non-constitutional legal claims raised by an alien even if review was eliminated under the federal habeas statute.<sup>67</sup>

In the 2001 opinion of *INS v. St. Cyr*,<sup>68</sup> the Supreme Court in a 5-4 opinion resolved the Circuit split concerning the continued availability of habeas review in immigration proceedings, adopting the position and reasoning of the majority in *Sandoval* rather than that of Judge Alito. Justice O’Connor was one of the dissenters in *St. Cyr*, and shared Judge Alito’s view that the 1996 amendments to the INA eliminated habeas review of immigration claims made by certain aliens. In apparent response to the Court’s ruling in *St. Cyr*, Congress amended the INA once again in 2005 to expressly eliminate habeas review via the adoption of the REAL ID Act.<sup>69</sup> In doing so, however, it specified that no Act provision limiting judicial or habeas review was to be “construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with [applicable INA provisions].”<sup>70</sup>

## Review of Agency interpretation of its Regulations

Under Supreme Court jurisprudence, federal courts must defer to formal and informal agency interpretations of an ambiguous regulation, unless such interpretations are “plainly erroneous or inconsistent with the regulation.”<sup>71</sup> No such deference is warranted when the intent of a regulation is clear.<sup>72</sup> Although Judge Alito has typically upheld immigration authorities’ interpretation and application of immigration regulations, an exception to this practice occurred in the 2004 case of *Soltane v. U.S. Dept. of Justice*.<sup>73</sup>

In *Soltane*, a nonprofit religious organization that provided services to mentally disabled young adults sought review of the denial of its visa petition on behalf of an alien employee. The INA provides that aliens who qualify as “special immigrants,” including those engaged in a “religious occupation or vocation” on behalf of a

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<sup>65</sup> *LaGuerre v. Reno*, 164 F.3d 1035 (7<sup>th</sup> Cir.1998).

<sup>66</sup> *Sandoval*, 166 F.3d at 243 (Alito, J., concurring in part and dissenting in part).

<sup>67</sup> *Id.* (Alito, J., concurring in part and dissenting in part).

<sup>68</sup> *INS v. St. Cyr*, 533 U.S. 289 (2001).

<sup>69</sup> P.L. 109-13, Division B, § 106 (2005).

<sup>70</sup> *Id.*

<sup>71</sup> *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

<sup>72</sup> *Id.*

<sup>73</sup> *Soltane v. U.S. Dept. of Justice*, 381 F.3d 143 (3<sup>rd</sup> Cir. 2004).

religious organization, be granted preference visas.<sup>74</sup> Immigration authorities had denied the organization's visa petition in part because the sponsored alien's proposed position as a houseparent was deemed not to be a "religious occupation or vocation," as that term was defined under regulation.<sup>75</sup> Among other things, immigration authorities characterized the proposed position's houseparent duties as having "a wholly secular function, even if the facility is operated by a charitable organization founded on religious principles."<sup>76</sup>

In a unanimous panel opinion written by Judge Alito, the court held that the denial of the visa petition was not supported by the record, because this denial was based on (1) an impermissible reading of the pertinent regulation defining "religious occupation" as excluding religious occupations with a secular component; and/or (2) a factual determination of the secular nature of the houseparent position which was not supported by substantial evidence in the record. The Circuit panel held that a job could qualify as a "religious occupation" under the regulatory definition of that term so long as it had "some religious significance," and noted that the pertinent regulation listed a number of occupations with secular components, such as "religious translator" and "religious counselor," as examples of jobs falling under the definition of "religious occupation."<sup>77</sup> The panel also charged these immigration authorities with describing the alien's job duties in a manner that "excluded any mention of the religious component of her duties" found in the administrative record, including her responsibilities to teach and lecture mentally disabled young adults on religious values.<sup>78</sup> Accordingly, the Circuit panel vacated and remanded the lower court's decision upholding immigration authorities' denial of the visa petition.

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<sup>74</sup> INA §§ 101(a)(27)(C)(ii), 203(b)(4); 8 U.S.C. §§ 1101(a)(27)(C)(ii), 1153(b)(4). To be eligible for such visas, religious workers must also have had two years' experience in their religious occupations immediately prior to the filing of their visa petitions.

<sup>75</sup> 8 C.F.R. § 204.5(m)(2).

<sup>76</sup> *Soltane*, 381 F.3d at 149.

<sup>77</sup> *Id.* at 150.

<sup>78</sup> *Id.* at 149-150.