TESTIMONY OF PETER N. KIRSANOW BEFORE THE SENATE

JUDICIARY COMMITTEE ON THE NOMINATION OF

JUDGE JOHN G. ROBERTS TO THE UNITED STATES SUPREME COURT

SEPTEMBER 15, 2005

Mr. Chairman, members of the Committee, I am Peter N. Kirsanow, a member of the U.S. Commission on Civil Rights and a partner in the labor and employment practice group of the Cleveland, Ohio law firm of Benesch Friedlander Coplan & Aronoff. I am appearing in my personal capacity.

The Commission on Civil Rights was established by the Civil Rights Act of 1957 to, among other things, study and collect information relating to discrimination or denial of equal protection laws under the constitution because of color, race, religion, sex, age, disability or national origin; appraise the laws and policies of the federal government relating to discrimination or denials of equal protection and serve as a national clearinghouse of information relating to discrimination or denials of equal protection on the basis of protected classifications.

In furtherance of the clearinghouse function and with the help of my assistant I have examined the civil rights-related opinions of Judge John Roberts as well as his record as an advocate in the context of prevailing civil rights jurisprudence. This was done by reviewing the opinions in the civil rights-related cases in which Judge Roberts participated while on the D.C. Circuit Court of Appeals and by examining the civil rights-related cases in which Judge Roberts was involved as an advocate before the Supreme Court. A more limited examination was also conducted of some of the civil rights-related memoranda written by Judge Roberts while Associate White House counsel, which are of lesser analytical value since, among other things, they often reflected the settled views of the Administration

Our examination reveals that Judge Roberts' approach to civil rights issues is consistent with generally accepted textual interpretation of the relevant constitutional and statutory provisions as well as governing precedent. His opinions evince appreciable degrees of judicial discipline, modesty and restraint and are consistent with his assertion during his confirmation

proceedings for the D.C. Circuit that, "My judicial philosophy accordingly insists upon some rigor in ensuring that judges properly confine themselves to the adjudication of the case before them, and seek neither to legislate broadly nor to administer the law generally in deciding that case." In short Judge Roberts' record on civil rights-related issues is exemplary: legally sound, intellectually honest and with an understanding and appreciation for the historical bases for civil rights laws.

Our examination also underscores that some aspects of Judge Roberts' record on civil rights have been mischaracterized and many of the criticisms are misplaced -- conflating Judge Roberts' positions as a lawyer advising or advocating on behalf of a client with his personal policy preferences. Three brief examples:

First, some have contended that during the 1982 reauthorization of the Voting Rights Act Judge Roberts supported an "anti-civil rights" interpretation of the Voting Rights Act. A review of Judge Roberts' record as Special Assistant to Attorney General William French Smith shows that he explicitly counseled in favor of reauthorization of the entire Voting Rights Act. Judge Roberts expressed concern, consistent with the Administration's position, regarding substantively redefining Section 2 of the Act in a manner that would sever the Act from its constitutional connection to the Fifteenth Amendment related to intentional or purposeful discrimination. His memoranda reflected the Administration's positive, supportive vision of voting rights, and expressed a concern that changing Section 2 could risk introducing confusion and uncertainty into one of the most successful pieces of civil rights legislation in the nation's history. Section 2 was indeed amended to incorporate an effects test, but Judge Roberts continued, on behalf of his client, to advocate vigorous enforcement of Section 2. As Principal

Deputy Solicitor General, Judge Roberts participated in three Section 2 cases and two Section 5 cases. In *Chisom v. Roemer*, Judge Roberts argued on behalf of the United States that the effects test under Section 2 applies to the election of state court judges. Indeed, in *Chisom* he argued not only in support of the effects test, but for an *extension* thereof. Also, in *Voinovich v. Quilter*, he argued that the State of Ohio's redistricting plan, which was largely based on an NAACP proposal, did not violate the Voting Rights Act or the Fifteenth Amendment. The Court agreed with the government's position unanimously.

Second, some have claimed that Judge Roberts has a regressive view of affirmative action. Perhaps the most frequently cited criticism of Judge Roberts' analysis of affirmative action is a memorandum he wrote to then Attorney General William French Smith questioning some of the arguments in a 1981 report of the U.S. Commission on Civil Rights. A detailed examination of the Commission's report shows that Judge Roberts' criticism was not only correct, but imperative.

In *United Steelworkers v. Weber* and *Johnson v. Transportation Agency* the Supreme Court upheld the legality of private employer affirmative action plans designed to remedy a manifest racial imbalance in an employer's workforce resulting from past discrimination or a traditionally segregated workforce. Although the terms "manifest imbalance" and "traditionally segregated workforce" were sufficiently nebulous for circuit courts to provide their own definitions in a given context, most courts require that there be some direct evidence of unlawful discrimination against the beneficiary group. The affirmative action programs of public sector employers face an even greater evidentiary burden: the need to survive strict scrutiny under the Fourteenth Amendment's Equal Protection Clause. In other words, the program must promote a compelling governmental interest and be narrowly tailored to serve that interest. What qualifies

as a compelling governmental interest is limited almost exclusively to remedying actual instances of discrimination by a particular employer.

The Commission's report, however, dispensed with the need for such proof. The report endorsed the use of affirmative action plans even when there is absolutely no evidence of unlawful discrimination. According to the report, a mere "imbalance" in numbers, *i.e.*, a showing that the percentage of minorities in an organization or workplace is below the respective percentages in society at large is all that is necessary to justify an affirmative action requirement. Not only was the Commission's report inconsistent with the status of the law in 1981, but it also fails to comport with the post-*Richmond v. Croson/Adarand Constructors v. Pena/Grutter v. Bollinger* affirmative action requirements.

Judge Roberts opposed unlawful racial quotas or racial set-asides untethered to a showing of discrimination. He supported the "bedrock principle of treating people on the basis of merit without regard to race or sex." And he declined to promote personal policy preferences.

Judge Roberts' measured approach to civil rights is further on display when his analysis on behalf of a client's interests in *Adarand Constructors v. Pena* is contrasted with his role as a judge in *Sioux Valley Rural Television, Inc. v. FCC*. The former case involved racial preferences in government contracting; the latter case involved racial preferences in government licensing. In *Adarand* Roberts represented a construction-industry trade association as an amicus challenging the federal government's practice of awarding general contractors on federal projects a financial incentive to hire subcontractors who were "socially and economically disadvantaged." The government's presumption was that "socially and economically disadvantaged" meant small minority businesses.

On behalf of his client, Judge Roberts argued that racial preferences in the award of construction contracts by the federal government should be subject to strict scrutiny under the Equal Protection component of the Due Process Clause of the Fifth Amendment. (The Court had previously held in *City of Richmond v. J.A. Croson Co.* that strict scrutiny applied to racial preferences an award of state contracts.) Roberts further argued that the only governmental interest that would satisfy strict scrutiny is the need to remedy specifically identified instances of past discrimination. Roberts also argued that once the objective of remedying specifically identified past discrimination is established, the narrow tailoring prong of strict scrutiny requires that the government (1) carefully consider race-neutral alternatives; (2) link any numerical objectives to the availability of qualified minority firms in the relevant market; (3) must establish durational limits; and (4) accord preferences only to those toward whom past discrimination has been proven. The "socially and economically disadvantaged"/small minority business preference simply did not pass strict scrutiny.

The Court held that all racial classifications, whether created by federal, state or local governmental actors are subject to strict scrutiny. The Court remanded the case for further consideration to address, among other things, the question of narrow tailoring.

In *Sioux Valley* a coalition of FCC licensees challenged the FCC's restructuring of certain preferences awarded to bidders on FCC broadcast licenses, contending that such restructuring demonstrated an unconstitutional motive to perpetuate race and gender-based preferences.

Prior to *Adarand* the FCC had provided a 25% bidding credit for businesses owned by women and minorities. The effect of the bidding credit was to reduce by 25% the amount a winning bidder owed the FCC for a license. The FCC also provided an advantage to small business bidders by permitting them to make a 20% down payment on the bid with the balance

paid out over five years. Small businesses owned by women or minorities could take advantage of both the minority/female bidding preference and the installment payment plan.

After *Adarand* the FCC revoked the minority/women bidding credit but, rather than eliminating the credit entirely, extended it to all winning small business bidders. In doing so, the FCC noted that such revocation would not harm the minority and female businesses that had previously received the credit since all such businesses qualified for and would now receive the small business credit.

The petitioners in *Sioux Valley* contended that while the new credit was facially neutral, it was impermissibly motivated by a racial purpose or object. The petitioners noted that in implementing the new race-neutral policy, the FCC had explicitly stated that the policy would not negatively affect the recipients of the revoked minority/female bidding credit because all of them also qualified as small businesses. Judge Roberts wrote the majority opinion for the D.C. Circuit Court of Appeals denying the petitioners' challenge. Judge Roberts stated that simply because the FCC had noted that the rule change would not harm the minority/female businesses that had previously gotten the credit does not evince discriminatory intent.

Judge Roberts could have reasonably struck down the racially neutral FCC rule change, since such change surgically and conveniently preserved bidding preferences for a subset of small businesses, all of which were minority/female businesses. Indeed, as an advocate in *Adarand* Judge Roberts had challenged, on behalf of his clients, preferences that were directed at "socio-economically disadvantaged individuals," the relevant and convenient subset of which consisted of minority-owned subcontractors.

Judge Roberts declined to strike down the rule. Instead, he deferred to the agency's action. It is submitted that this is a prime example of Judge Roberts' judicial approach and

temperament that are the best protection against erosions to civil rights liberties: a faithful and disciplined interpretation of the law.

A third contention unsupported by our examination of Judge Roberts is that the civil rights arguments he made on behalf of clients are regressive or out of the mainstream. A review of the scores of cases Judge Roberts has litigated before the Supreme Court in nearly two decades produces 23 cases that may be termed, in the traditional sense, "civil rights cases." That is, the issues in the cases involved matters pertaining to constitutional provisions such as the Fifth or Fourteenth Amendments or statutes such as the 1964 Civil Rights Act, the 1965 Voting Rights Act, or the Americans with Disabilities Act, etc. Consider that of the tens of thousands of cases litigated annually in the lower courts, the Supreme Court reviews only several dozen a year. By the time the arguments advance to the Supreme Court they have already passed through a torturous gauntlet of legal analyses. Most arguments that survive to be heard before the Court, therefore, are taut and tempered. Yet 50% of these arguments must necessarily fail, regardless of how lucid, cogent or substantive they may be. Probabilities would suggest, therefore, that if Judge Roberts somehow slipped past the Supreme Court gatekeepers and was making regressive or nonmainstream arguments before the Court, such arguments would be rejected virtually 100% of the time, or at a bare minimum, far more than 50% of the time. Yet the record shows that the Court agreed with the position Judge Roberts argued on behalf of his clients 71% of the time. This is hardly indicative of positions inconsistent with prevailing civil rights jurisprudence.

Of the 13 justices before whom John Roberts argued, 11 agreed with his advocacy interests more than 50% of the time. These justices included those that might be considered in the colloquial sense "conservative," such as Justice Rehnquist (75% of the time), Justice Scalia (71% of the time), and Justice Thomas (71% of the time). Yet they also include Justices

colloquially described as "liberal," such as Justice Ginsberg (60% of the time), Justice Souter (59% of the time) and Justice Stevens (58% of the time). Even Justice Thurgood Marshall, considered the premiere civil rights litigator of the twentieth century, agreed with Judge Roberts' advocacy position 67% of the time, nearly the same as Justices Scalia and Thomas and more than Justice O'Connor.

Another measure of Judge Roberts' judicial modesty is reflected in an analysis of the 129 three-judge panel decisions in which he participated while on the D.C. Circuit. His votes on such panels were generally consistent with those of the other panel members, regardless of whether the judges were appointed by Democrats or Republicans.

One hundred twenty-four of the 129 panels resulted in unanimous opinions. Judge Roberts voted with the majority 125 of 129 times and authored 45 majority opinions, 43 of which were unanimous. In the four cases in which he did not join the majority, Judge Roberts dissented in one, concurred in part and dissented in part in another, and concurred in the judgment incurred in part of the final two.

Judge Roberts sat with two Democratic-appointed judges in 20 cases, 17 of which resulted in unanimous decisions. He wrote the majority opinion seven times, six of which were unanimous. Judge Roberts sat on 65 panels comprised of another Republican-appointed colleague and one Democratic-appointed colleague. Of those cases, 63 were unanimous and two were decided by 2-1 votes. Judge Roberts wrote the majority opinion 23 times, 22 of which were unanimous. In one of the 2-1 decisions, Judge Roberts voted with the majority upholding civil rights claims against a state actor's Eleventh Amendment sovereign immunity defense. In that case he joined the opinion of his Democratic-appointed colleague.

In the remaining 44 panels, Judge Roberts sat with two other Republican-appointed colleagues. All 44 panels produced a unanimous result. Judge Roberts wrote 15 of the opinions.

In summary, Judge Roberts voted with his colleagues 97% of the time. Even when he was on panels with two other Democratic-appointed judges, the decisions were unanimous 85% of the time. Clearly not all of these cases were civil rights related, but it is just as clear that Judge Roberts' record on the D.C. Circuit demonstrates that he is not an outlier.

Judge Roberts' 25-year record on matters pertaining to civil rights demonstrates an unwavering commitment to equal protection under the law and a comprehensive understanding of our civil rights laws that would make him an impressive addition to the Supreme Court.