TESTIMONY OF PETER N. KIRSANOW BEFORE THE SENATE JUDICIARY COMMITTEE ON THE NOMINATION OF JUDGE SAMUEL A. ALITO JR. TO THE UNITED STATES SUPREME COURT JANUARY 12, 2006

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 or 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 Samuel Alito as well as his record as an advocate in the context of prevailing civil rights jurisprudence. This was done by reviewing the opinions in all of the civil rights-related cases in which Judge Alito participated while on the Third Circuit Court of Appeals and by examining every civil rights-related case in which Judge Alito was involved as an advocate before the Supreme Court.

Our examination reveals that Judge Alito's 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 precision, discipline, modesty and restraint and are consistent with a judicial philosophy that insists that judges properly confine themselves to the adjudication of the case before them and not legislate broadly or administer the law generally in deciding a case. In short Judge Alito's

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record on civil rights-related issues is exemplary: precise, 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 Alito's record on civil rights have been mischaracterized and many of the criticisms are misplaced. Three brief examples:

First, some have claimed that Judge Alito has a regressive view of affirmative action, one to the extreme right of Justice Sandra Day O'Connor. Perhaps the most frequently cited criticism of Judge Alito's analysis of affirmative action pertains to the three affirmative-action cases in which Judge Alito participated (on brief) during his tenure in the Reagan Administration's Solicitor-General's Office — *Wygant v. Jackson Board of Education*, *Sheet Metal Workers v. EEOC*, and *Firefighters v. Cleveland* (all involving expansive racial preferences as remedies for discrimination). Notwithstanding the fact that positions espoused as an advocate for a particular Administration are poor proxies for interpretive doctrine, there is scant evidence that as a Supreme Court Justice, Judge Alito would restrict affirmative action remedies currently available under *United Steelworkers v. Weber*, *Johnson v. Transportation Agency* or *Grutter v. Bollinger* more than would Justice O'Connor. In all three cases, Judge Alito essentially argued that rigid quotas are unlawful and that preferences based solely on race or ethnicity must, at a minimum, be based on the beneficiary's status as an actual victim of discrimination. Even if Judge Alito's advocacy positions in these three cases were somehow probative of his interpretive doctrine as a judge, it is interesting to note that his positions were not substantially dissimilar from those of Justice O'Connor.

For example, in *Wygant v. Jackson Board of Education*, the issue was whether the equal-protection clause of the Fourteenth Amendment permits a public entity to grant certain public

employees preferential protection against layoff solely on the basis of race or national origin where there is neither a finding nor evidence that the employees have been discriminated against by such entity. Judge Alito argued that such a layoff provision violates the equal-protection clause, failing to withstand strict scrutiny. Justice O'Connor agreed.

In *Sheet Metal Workers v. EEOC*, the issue was whether, in crafting remedies under Title VII, a court may award preferences based solely on race or ethnicity, rather than on the beneficiary's status as an actual victim of discrimination, and whether such remedies are unconstitutional. The case also contained myriad important sub-issues. In *Sheet Metal Workers*, Justice O'Connor did not hold in favor of Judge Alito's general advocacy interest, but was favorably disposed to Judge Alito's position regarding the issue of rigid, over-inclusive racial preferences as a remedy for non-victims under Title VII.

In *Firefighters v. The City of Cleveland*, the issue was whether a judgment entered with the consent of a defendant public employer in an action brought under Title VII may award racial preferences and promotions to persons who are not the actual victims of such employer's discriminatory conduct. Judge Alito argued in the negative. In that case, Justice O'Connor disagreed with Judge Alito's advocacy interest.

Again, even if Judge Alito's advocacy positions are predictive of his judicial decisions, the record described above fails to demonstrate extreme doctrinal differences with Justice O'Connor on affirmative action. Rejection of quotas and expansive racial preferences does not evince hostility toward affirmative action, let alone civil rights in general.

Judge Alito's measured and restrained approach to racial preferences and affirmative action is exhibited in his record on the Third Circuit. In Judge Alito's only affirmative-action case involving race, *Taxman v. Board of Education of the Township of Piscataway*, he joined

eight Third Circuit judges in holding that a school board violated Title VII when it used its affirmative action plan to grant a non-remedial workforce preference by laying off a teacher in order to promote racial diversity. (It should be noted that the Clinton Justice Department concurred with the majority position.)

Judge Alito's approach to affirmative action, as well as other civil-rights issues, is methodical and precise, producing closely circumscribed opinions respectful of the interests of civil-rights claimants without compromising precedent or the rule of law. Judge Alito opposed unlawful racial quotas or racial set-asides untethered to a showing of discrimination. He declined to promote personal policy preferences.

Second, it has been asserted that Judge Alito erects extraordinarily high standards for Title VII plaintiffs. Some critics have cited Judge Alito's dissent in *Bray v. Marriott* as evidence of his tendency to impose "almost impossible evidentiary burdens" upon plaintiffs in Title VII cases. But a review of *Bray* actually shows that Judge Alito's dissent steadfastly adheres to precedent and carefully applies the law to the facts, while the majority opinion departed from the well-established burden of proof required of a Title VII plaintiff.

The Title VII burden-of-proof framework set forth in *McDonnell Douglas v. Green* and its progeny is well-established:

A. To establish a *prima facie* case of unlawful discrimination, a plaintiff must establish that he or she

1. is a member of a protected class;
2. applied for and was qualified for the job opening in question;
3. was rejected; and

4. after rejection, the job remained open and the employer continued to seek applicants to fill it.

B. Once a plaintiff establishes a *prime facie* case, the burden of *production* shifts to defendant to articulate a legitimate, non-discriminatory reason for plaintiff's rejection. It is important to note that the burden of production is not a burden of *proof*, i.e., defendant is not required to prove that its articulated reason was, in fact, the basis for plaintiff's rejection. Rather, the defendant is required to produce evidence that there was a nondiscriminatory reason for plaintiff's rejection. The burden of proving discrimination always remains with plaintiff.

C. If defendant proffers a legitimate, nondiscriminatory reason for plaintiff's rejection, then plaintiff must present evidence that either

1. casts sufficient doubt on defendant's proffered reason(s) so that a fact finder could reasonably conclude that each reason was a fabrication (i.e., plaintiff must produce evidence from which the fact finder could reasonably *disbelieve* the employer's articulated reason for rejection. It is not enough for plaintiff merely to show that an employer's reason was wrong, unwise or mistaken) [Pretext Prong One] or

2. allows the fact finder to infer that discrimination was more likely than not a motivating or determining reason for the rejection [Pretext Prong Two].

In *Bray*, plaintiff, a black female employee, brought a complaint against Marriott alleging Marriott discriminated against her in favor of a white female employee when it failed to promote Bray to the position of Director of Services.

Marriott's proffered nondiscriminatory reason for selecting the white female over Bray was that the former was better qualified: The white applicant had (1) a higher three-year performance rating (1, 2, and 1 versus 2, 2, and 2); (2) a higher job-grade level (45 versus 43); (3) a degree in restaurant and hotel management versus English and history; and (4) was twice named Manager of the Year, which Bray never was.

Bray attempted to cast doubt on Marriott's proffered reason by introducing evidence that (1) the white applicant's most recent performance rating was based on a semi-annual review rather than an annual one, (2) Marriott never told Bray that she was rejected before interviewing the white applicant, contrary to Marriott's internal guidelines, and (3) there were inaccuracies in a Marriott general manager's deposition testimony regarding the evaluation and selection process.

The district court was unpersuaded that Bray's evidence created a genuine issue of material fact and granted Marriott's motion for summary judgment. At the district-court level, Bray had maintained that she had satisfied both pretext prongs, but on appeal she only challenged the district court's Prong One determination. Bray contended that she had shown that she exceeded the white employee in every objective measure and that there was no reasonable explanation for her not getting the position other than race discrimination.

A majority of the Third Circuit three-judge panel agreed that Bray had presented enough evidence of inaccuracies and discrepancies in Marriott's proffered nondiscriminatory reason to allow a reasonable fact finder to infer that such reason was a pretext for discrimination.

Specifically, the majority cited Marriott's failure to comply with its internal guidelines by failing to notify plaintiff of her rejection before interviewing the white applicant; the general manager's inaccurate deposition testimony that he thought Bray was not capable of doing the job; the general manager's inaccurate deposition testimony that the white applicant was unanimously chosen by the three-member selection committee; and the fact that the white applicant's last evaluation was a semi-annual one as opposed to an annual one. The Third Circuit reversed.

Judge Alito dissented, noting that the Prong One standard requiring plaintiff to provide evidence that may cause a reasonable fact finder to *disbelieve* defendant's proffered reason is a higher standard than one that requires only that the fact finder *disagree* with the reason. Judge Alito noted that the purported inconsistencies and discrepancies in Marriott's proffered reason did not rise to the Prong One standard and, moreover, were qualified by other evidence: *viz* (1) Marriott's failure to comply with its internal guidelines regarding notifying plaintiff of her rejection before interviewing the white applicant was a de-minimus administrative error; (2) the general manager's inaccurate statement that Bray was not capable of doing the job was clarified by his very next deposition statement wherein he stated that he was looking for the "best qualified" candidate; (3) the general manager's inaccurate testimony that the white applicant was selected unanimously was, again, de-minimus (two members agreed with the selection, one abstained); and (4) the issue of the semi-annual review, even if somehow probative of discriminatory animus (presumably by suggesting that it was an effort to inflate the white applicant's record), was not raised by Bray on appeal and, accordingly, was waived.

While the majority's burden of proof analysis was not necessarily a radical departure from the standard in a pretext case, Judge Alito "respectfully suggest(ed) that what the majority here has done is to weaken the burden on plaintiff at the pretext stage of the *McDonnell Douglas*

framework to one where all the plaintiff needs to do is point to minor inconsistencies or discrepancies in terms of the employer's failure to follow its own internal procedures in order to get to trial."

Judge Alito's suggestion is a bit modest. In truth, the majority's approach effectively transforms defendant's burden of production into a burden of *proof*, thereby derogating plaintiff's burden of proof and incorporating, however subtlely, a presumption of discrimination into the *McDonnell Douglas* framework.

It is submitted that this is a prime example of Judge Alito's judicial approach and temperament that are the best protection against erosions to civil rights liberties: a precise, faithful and disciplined interpretation of the law.

A third contention unsupported by our examination of Judge Alito is that the civil rights votes and opinions are regressive or out of the mainstream. A review of the hundreds of cases upon which Judge Alito has sat in his 15 years on the Third Circuit produces 121 panels that decided 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.

If Judge Alito is a hard-right extremist and outside the judicial mainstream, then by definition one would expect that he would rarely side with his fellow judges on the Third Circuit Court of Appeals. In fact, one would expect that he would almost never agree with those judges appointed by Democrat presidents. Further, one would expect that Judge Alito would vote with his Republican colleagues against his Democrat ones by overwhelming margins.

But a review of Judge Alito's extensive civil rights record on the Third Circuit shows that if he is a far right, closed-minded ideologue, then so are all the other judges on the court, whether appointed by Democrats or Republicans.

Obviously that is not the case.

Judge Alito's co-panelists on civil rights cases agreed with his votes and written opinions 94% of the time, producing unanimous results 90% of the time. Moreover, Democrat-appointed judges actually agreed with Judge Alito's position at a slightly higher rates (96%) than Republican-appointed judges (92%).

Consider Judge Alito's record when sitting on panels with two Democrat-appointed judges (RDD Panels); then compare such record to the panels where Judge Alito sat with one Republican-appointed judge and one Democrat-appointed judge (RRD Panels); and finally compare such record to panels with two other Republican-appointed judges (RRR Panels):

RDD Panels. Judge Alito sat with two Democrat-appointed judges in 20 cases, and all 20 were unanimous. The results favored the civil rights plaintiff six times (30%) and were adverse 14 times (70%). Judge Alito wrote the majority opinion in five of the cases. Where Judge Alito wrote the opinion, the results favored the civil rights plaintiff 40% of the time and were adverse 60% of the time.

RRD Panels. Judge Alito sat with one Republican and one Democrat-appointed judge in 60 cases, where his Democrat-appointed colleague agreed with him 56 times (93%) and disagreed only four times (7%) – the same rate as his Republican-appointed colleagues. 54 of the 60 cases were unanimous (90%). The results in slightly over half of the cases were adverse to the interests of the civil rights claimant. Judge Alito wrote the opinion for a unanimous court in 14 cases, for a split court in three, concurred in two and dissented in two.

RRR Panels. Judge Alito sat with two other Republican-appointed colleagues in 41 cases with a 90% agreement rate. All but six were unanimous (85%). Judge Alito wrote 11 unanimous opinions, one for a split court, one concurrence and one dissent.

Interestingly, panels in which Alito participated with two other Democrat-appointed judges were more likely to render decisions adverse to civil rights plaintiffs than panels in which Judge Alito was joined by two other Republicans. Moreover, the RDD Panels were more likely to be unanimous (100%) than the RRR Panels (85%) – hardly evidence of a partisan ideologue.

Obviously, a thorough assessment of Judge Alito's judicial approach requires an analysis of the actual facts and applicable law of each case. Some disagreements may occur in cutting-edge cases. Nonetheless, it cannot be credibly claimed that Judge Alito is a judicial extremist or hostile to civil rights without leveling the same charges against every other judge on the court.

Judge Alito has issued at least forty-seven written civil rights opinions: thirty-five majority opinions, five concurring opinions, and seven dissenting opinions. Of Judge Alito's decisions on 3-Judge panels, he sat with forty-six federal judges from the Third Circuit, five other Circuit Courts of Appeals (5th, 8th, 9th, 11th & Fed. Cir) and nine lower federal courts. Judge Alito's co-panelists represent the appointments of 5 Republican and 3 Democratic Presidents. In the identified civil rights cases, they agreed with his votes and written opinions 94% of the time, producing a unanimous result 90% of the time.

3 Judge Panels: Agreement Rate with Judge Alito's Civil Rights Opinions, By Nominating-President				
Nominating President	**No. of Judges**	**Cases**	**Agree**	**3-0 Panel**
Johnson	3 Judges	9	**9 (100%)**	9 (100%)
Ford	1 Judge	6	**6 (100%)**	5 (83%)
Bush II	5 Judges	17	**17 (100%)**	17 (100%)

3 Judge Panels: Agreement Rate with Judge Alito's Civil Rights Opinions, By Nominating-President				
Nominating President	**No. of Judges**	**Cases**	**Agree**	**3-0 Panel**
Carter	7 Judges	24	**23 (96%)**	23 (96%)
Clinton	7 Judges	66	**63 (95%)**	61 (92%)
Reagan	13 Judges	78	**74 (94%)**	71 (91%)
Bush I	3 Judges	13	**12 (92%)**	12 (92%)
Nixon	7 Judges	29	**22.5 (77%)**	21 (72%)
Total	**46 Judges**	**242**	**227 (94%)**	**219 (90%)**
D-Total	**17 Judges**	**99**	**95 (96%)**	**93 (94%)**
R-Total	**29 Judges**	**143**	**131.5 (92%)**	**126 (88%)**

3-Judge Panels: Rate of Agreement with Judge Alito's Position in Civil Rights Cases & Rate of Panel Unanimity (*sorted by individual judge sitting with Alito on at least six occasions)							
Judge	***Party of Nominating President***	**No. of Cases**	**Agree**	**Dis-agree**	**Member of a Unanimous Panel**	**Agree %**	**Panel Unanimity %**
Fuentes, Julio M.	*D (Clinton)*	**18**	18		18	**100%**	100%
Ambro, Thomas L.	*D (Clinton)*	**11**	11		11	**100%**	100%
Greenberg, Morton Ira	*R (Reagan)*	**11**	11		10	**100%**	100%
Smith, D[avid] Brooks	*R (Bush II)*	**8**	8		8	**100%**	100%
Oberdorfer, Louis Falk	*D (Carter)*	**6**	6		6	**100%**	100%
Barry, Maryanne Trump	*D (Clinton)*	**6**	6		5	**100%**	83%
Schwarzer, William	*R (Ford)*	**6**	6		5	**100%**	83%
Cowen, Robert E.	*R (Reagan)*	**6**	6		5	**100%**	83%
Scirica, Anthony Joseph	*R (Reagan)*	**20**	19	1	19	**95%**	95%
Becker, Edward Roy	*R (Reagan)*	**16**	15	1	15	**94%**	94%
McKee, Theodore Alexander	*D (Clinton)*	**15**	14	1	14	**93%**	93%
Nygaard, Richard Lowell	*R (Reagan)*	**13**	12	1	11	**92%**	84%
Sloviter, Dolores Korman	*D (Carter)*	**10**	9	1	9	**90%**	90%
Rosenn, Max	*R (Nixon)*	**9**	8	1	8	**89%**	89%

3-Judge Panels: Rate of Agreement with Judge Alito's Position in Civil Rights Cases & Rate of Panel Unanimity (*sorted by individual judge sitting with Alito on at least six occasions)							
Judge	***Party of Nominating President***	**No. of Cases**	**Agree**	**Dis-agree**	**Member of a Unanimous Panel**	**Agree %**	**Panel Unanimity %**
Rendell, Marjorie O.	*D (Clinton)*	**12**	10	2	9	**83%**	75%
Roth, Jane Richards	*R (Bush I)*	**6**	5	1	5	**83%**	83%
Stapleton, Walter King	*R (Nixon)*	**9**	5.5	3.5	5	**61%**	55%
Totals	***7-Ds; 10-Rs***	***182***	***169.5***	***12.5***	***163***	***93%***	***90%***

Again, these statistics are merely descriptive and do not purport to be predictive of whether Democratic-appointed judges share Judge Alito's jurisprudence or approach in civil rights cases. However, the high agreement rate suggests that Judge Alito's judicial approach is not out of the mainstream of contemporary legal thought.

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