

**PREPARED CLOSING STATEMENT OF RANKING MEMBER CHARLES E. GRASSLEY
FOR THE SENATE JUDICIARY COMMITTEE HEARING – “BARRIERS TO JUSTICE
AND ACCOUNTABILITY: HOW THE SUPREME COURT'S RECENT RULINGS WILL
AFFECT CORPORATE BEHAVIOR.”**

JUNE 29, 2011

As I said in my opening statement, I had concerns about whether this hearing was going to be objective and fair, in light of the less than objective title.

Unfortunately, my concerns were well-founded.

According to one member of the majority, the decisions of the United States Supreme Court could be summed up in two words: "corporation wins."

I strongly disagree with the claim that the current Supreme Court is biased in favor of businesses. The substantive analysis simply doesn't support the claim.

The attacks on the Supreme Court, and in particular, the Republican appointed members, are based on vague generalities and partisan talking points.

By sharp contrast, my conclusion is supported by analysis, not rhetoric.

In particular, my conclusion is supported by the significant analysis done by Andrew Pincus, who actually reviewed the Court's decisions for the last year and by Justice Stephen Breyer's analysis from October of last year.

Mr. Pincus is a well-respected member of the Supreme Court bar and has argued 22 cases before the Court. He was the General Counsel for the Department of Commerce during the Clinton administration. His testimony analyzed the Court's decisions from the last term in detail.

As Mr. Pincus explained in his written testimony:

The logical way to assess the impact upon corporate behavior of the Court's recent decisions is to examine the outcomes in *all* of the cases involving private plaintiffs seeking damages from businesses. Business parties lost just as many times as they won such cases. Indeed, in the cases involving substantive interpretations of employment law, business parties lost *every* case decided by the Court.

Consequently, he concluded that there "simply is no basis for concluding that the Court's decisions, taken as a whole, favored business defendants over plaintiffs seeking damages."

I agree.

In total, for the Supreme Court's October 2010 Term, plaintiffs prevailed in 9 cases and business parties prevailed in 9 cases.

More specifically, in his written testimony, Mr. Pincus identified all 18 cases by name and briefly summarized each one. In sum, employees prevailed in all three of the labor cases decided by the Supreme Court this past Term. Plaintiffs prevailed in two of the three securities cases. The results in tort preemption cases were also divided, with plaintiffs winning one and defendants winning two. The results in cases involving class action rules were evenly divided, as were the remaining business cases.

Mr. Pincus went even further with his analysis. He pointed out that the Supreme Court's rulings in disputes between business and government divided almost evenly, with four rulings for government and five for business parties. Again, he identified each case by name and provided a brief description of the subject matter of the dispute.

Robert Alt's testimony also supports my conclusion that the Supreme Court is not biased in favor of businesses.

In addition to actually examining some of the Court's decisions, Mr. Alt, who is a senior fellow at The Heritage Foundation, points out that "[g]iven the small and discretionary docket that the Supreme Court hears, there is no empirical reason to believe that the winners and losers as between any set of opposing interest groups should be evenly distributed."

Mr. Alt also made the following relevant observation about the inconsistencies with the attacks on the Supreme Court: "In addition to cherry-picking cases, critics of the Roberts Court have also assiduously avoid[] revealing the fact that liberal members of the Court have been the authors of some of the very cases of which they complain, and of some of the more pro-business cases that they conveniently omit."

Moreover, the majority completely ignores Justice Breyer's analysis from last year.

Now lest we forget, Justice Breyer has been on the Supreme Court since 1994, when President Clinton appointed him. And he was a former counsel to the Senate Judiciary Committee, advising the late Senator Ted Kennedy.

During an interview in October of last year, Justice Breyer rejected the accusation that the Supreme Court has a pro-business slant and said the Court doesn't rule in favor of companies any more frequently than it has historically.

"I looked back," Breyer said "I couldn't find a tremendous difference in the percentage of cases."

Breyer also said that partisan politics doesn't influence the Court's actions, even in cases with political ramifications, including the *Citizens United* decision, and the *Bush v. Gore* ruling.

I too disagree with the claim that the Supreme Court is biased in favor of businesses.

So, what's the majority's substantive response to the actual analysis of the Supreme Court's decisions?

There is none.

I also have to disagree with another point made at the hearing.

Near the conclusion of the hearing, a member of the majority stated that "every American who hears the word 'jury' and has the phrase 'runaway jury' jump into their mind, every American who hears the word 'lawsuit' and has the phrase 'frivolous lawsuit' jump into their mind has been the successful subject of a long campaign of indoctrination [sponsored by corporations]..."

I strongly disagree.

Individuals with legitimate claims should have a chance to make them. But not all individuals have legitimate claims.

Frivolous lawsuits are a very real problem. The billions of dollars wasted on frivolous lawsuits cost Americans jobs and severely damage our economy. The precise cost of America's lawsuit culture is staggering. The tort system's direct costs in 2002 were \$233 billion, the equivalent of a 5% tax on wages. Today that number is even higher; the annual direct cost of American tort litigation exceeds \$250 billion.

Indeed, frivolous lawsuits are helping to prevent the "innovation" that the Obama Administration is touting as the key to "job creation" and economic recovery.

For example, firms with recent initial public offerings are most at risk to be sued. In fact, companies are most likely to be sued in their second year of public trading. In other words, the very corporations most likely to be the source of significant new job creation are at the highest risk of being sued just when they are seeking expansion capital through public offerings.

In particular, frivolous lawsuits hurt small businesses. Small businesses rank the cost and availability of liability insurance as second only to the cost of health care as their top concerns, and both problems are fueled by frivolous lawsuits.

The front-line defense against frivolous lawsuits and the misuse of our legal system is Rule 11 of the Federal Rules of Civil Procedure. This rule is intended to deter frivolous lawsuits by sanctioning the offending party. The power of Rule 11 was diluted in 1993. This weakening is unacceptable to those of us who want to preserve courts as neutral forums for dispute resolution.

That is why I introduced the Lawsuit Abuse Reduction Act of 2011 ("LARA"), which amends Rule 11 to restore its strength and ability to truly deter frivolous lawsuits. Representative Lamar

Smith, the Chairman of the House Judiciary Committee, introduced an identical bill in the House of Representatives.

Based on the majority's statements at the hearing, it would seem that in their view, businesses should lose every single case that they have before the Supreme Court and perhaps every court, regardless of what the law provides.

I disagree with this view.

What businesses, just like all litigants, deserve from the judiciary and from Congress is a fair hearing, protection of their rights, and a measure of predictability in the law. Nothing more and nothing less.

As demonstrated by the substantive analysis set forth in Mr. Pincus' and Mr. Alt's testimony and by Justice Breyer's analysis, there is no basis for the accusation that the Supreme Court is biased in favor of businesses.

I can only hope that these accusations will end. They are not helping anyone, and they may be hurting our legal system.