Testimony of Robert Alt
Before the United States Senate
Committee on the Judiciary

"Barriers to Justice and Accountability:
How the Supreme Court's Recent Rulings Will Affect Corporate Behavior."

My name is Robert Alt. I am the Deputy Director and Senior Legal Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation.[1]

Thank you, Chairman Leahy and Ranking Member Grassley, for inviting me to testify at this hearing on the topic of "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior."

The title to this hearing suggests a predetermined conclusion—that recent decisions by the Supreme Court will create "barriers" to justice and accountability, and will somehow create adverse incentives for corporate behavior. The facts do not support this conclusion.

The suggestion that recent decisions create barriers to justice and corporate accountability appears to be an extension of the accusation bandied predominantly by partisan activists that the Roberts Court is a "pro-corporatist" court. The story of a conservative, activist, pro-corporatist Roberts Court may sound plausible at first blush, particularly with its repetition and regrettable distortion of the cases involved, but it is just a story—and a fictional one at that. This story applies a flawed definition of judicial activism, a deliberately skewed sample of the business decisions of the Roberts Court, and misrepresentations of key decisions of the Roberts Court.

In contrast to this rhetorical embellishment, reviewing the business cases from recent terms of the Court leads to several important conclusions: 1) the Court frequently speaks in business cases not in the fractured voice characterized by the Court's critics, but in a unanimous or super-majoritarian voice; 2) far from creating new "barriers" to justice or accountability, the Court's decisions assailed in today's hearing reject new, novel, and frequently unsupported theories advanced by trial lawyers to circumvent reasonable existing requirements, which requirements were designed to prevent frivolous litigation and to assure Due Process for all parties; and 3) the designer of many of these requirements enforced by the Courts is not the Court itself, but Congress.

In some cases, like those addressing personal jurisdiction, the Constitution dictates the outcome in order to assure Due Process to the parties. But most of the business decisions were questions of statutory interpretation, and as such, Congress, having established the rules applied in the cases, could modify the law if it felt that there were indeed barriers to justice and accountability.

---

[1] The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

While such congressional modification is possible, it is unwise. A review of a highly criticized case from this term—*Janus Capital Group, Inc. v. First Derivative Traders*—reveals that there is ample access to justice, accountability, and incentives for good corporate behavior. Modifying the law at issue in these cases would do little if anything to achieve greater justice, accountability, or proper business incentives—indeed in many cases it would create injustice by depriving parties of the traditional protections afforded parties in litigation. But it would unquestionably serve as a major boon to the trial bar, and would add substantial legal costs and uncertainty to U.S. markets at a time that those markets are sluggish at best. Congress should not reward special interests to the detriment of the U.S. economy, and it should not tilt the legal system so far in favor of plaintiffs so as to create fundamental unfairness.

I will address the general complaints of activism and pro-corporatism by the court before turning to the decision in *Janus Capital Group.*

Defining Activism Down

Judicial activism—real judicial activism—occurs when judges write subjective policy preferences into their legal decisions rather than apply the constitutional or statutory provisions according to their original meaning or plain text. Judicial activism may be either liberal or conservative; it is not a function of outcomes, but one of interpretation. Judicial activism does not necessarily involve striking down laws, but may occur when a judge applies his or her own policy preferences to uphold a statute or other government action which is clearly forbidden by the Constitution.

Dissatisfied with this accepted definition, critics of the Roberts Court (and the Rehnquist Court before that) have engaged in a concerted effort to redefine judicial activism downward. Under one formulation, judicial activism occurs any time that a statute is struck down.[2] While this may seem appealing given its seemingly objective, value-neutral approach, judicial activism has traditionally been understood as a term of reproach for judicial decisions which overreach proper judicial authority. However, the act of striking down clearly unconstitutional statutes is not only within proper judicial authority, but the failure to do so based upon policy preferences would itself fall into the traditional definition of activism. Accordingly, this definition distorts the traditional understanding of activism, and has been used in a concerted way to equate rightful acts of the Roberts Court with wrongful, genuinely activist acts of prior liberal courts.

---

[2] *See, e.g.,* Cass Sunstein, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 42–43 (2005). It is worth noting that this formulation is frequently utilized in a highly skewed fashion—one which focuses exclusively on striking down federal legislation in order to permit the argument made by Sunstein and others that the Rehnquist and Roberts courts are more activist than prior courts. Leaving aside the obvious error in ascribing what is well-understood to be a pejorative to what may be a positive act—e.g., correctly striking down clearly unconstitutional laws—such a formulation lacks any basis for failing to include the striking down of *state* laws—acts which, to borrow Sunstein's words, similarly would "preempt the democratic process." The key distinction seems to be that the inclusion of such acts would force the true radicals in academia and elsewhere to confront that tens-of-state-laws swept aside in numerous decisions by the Warren Court—data which would upset their thesis that conservative courts are more activist

In another popular version, judicial activism is all-but-meaningless—a term of derision that means little more than "I don't like the policy outcome of this decision." Critics of the Court's business decisions frequently apply little more than this standard. Thus, individuals who dislike the outcome in *Sorrell v. IMS Health Inc.*[3], which struck down a law restricting speech related to brand name pharmaceutical marketing based upon the First Amendment, are likely to call that case "activist," but many of these same people are likely to laud the Court's decision striking down California's restriction on selling violent video games to minors,[4] despite the fact that it also turns on Free Speech rights exercised by corporations. The key distinction between the criticism of one case and the praise of the other does not appear to be a conclusion of law, but a conclusion of policy preference.

In order to determine whether cases are truly activist, it is necessary to carefully review the cases and interpret the governing text in a legitimate manner, rather than simply assert whether one likes or dislikes the particular outcome. When this proper standard is applied to the Court's business docket, the activist moniker does not fit.

The "Pro-Corporatist" Distortion

The claim the Roberts Court is a pro-business or pro-corporatist court frequently turns on little more than a claim that the Court has decided cases in favor of particular business parties, or has sided with businesses more than non-business parties in recent cases. At the outset, it is worth noting that neither of these claims, if true, says anything about whether the judgments are *correct*. Given 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.

The allegation that the Court is too pro-business became fashionable following Jeffrey Rosen's 2008 article, *Supreme Court Inc*.[5] Even at the time of this article, however, legal scholars questioned whether the evidence offered was sufficient to support the premise of a pro-business Court.[6] For example, Rosen's observation that "the Roberts Court has heard seven [antitrust cases] in its first two terms—and all of them were decided in favor of the corporate defendants" seems much less impressive when you discover that five of those seven cases involved businesses suing other businesses.[7] So yes, a corporation won those cases, but another corporation *lost* those cases. Are we then to take it that the Roberts Court was simultaneously pro-business and anti-business? Similarly, Rosen's assertion that "[o]f the 30 business cases [in the 2006-07 term], 22 were decided unanimously, or with only one or two dissenting voices" is hard to square with the claim

---

[3] ___ U.S. ___, 2011 WL 2472796 (June 23, 2011).
[4] Brown v. Entertainment Merchants Ass'n, ___ U.S. ___, 2011 WL 2518809 (June 27, 2011).
[5] Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAGAZINE, Mar. 16, 2008.
[6] *See, e.g.*, Eric Posner, *Is the Supreme Court Biased in Favor of Business*, SLATE (Mar. 17, 2008, 3:16 PM), http://www.slate.com/blogs/blogs/convictions/archive/2008/03/17/is-the-supreme-court-biased-in-favor-of-business.aspx (last visited June 29, 2010).
[7] *Id.*

that there has been any significant pro-corporatist shift in the Roberts Court. After all, most of the justices, including the most liberal justices, remained the same when Roberts and Alito joined the Court. The frequent unanimity and near unanimity, with supermajorities comprising justices of both ends of the ideological spectrum, suggests that rather than a pro-business bias motivating the outcome, that the Court ruled in favor of businesses because those parties' legal positions were meritorious—as defined by what the law actually dictated. To suggest otherwise would require one to accept not only that the recent additions to the Court exercised pro-business activism, a claim that is not borne out by the facts, but that liberal Justices like Stevens, Ginsburg, Breyer, and Souter were frequently motivated by pro-business activist impulses.

By the end of even the Court's 2008-09 term, academics and the media increasingly acknowledged that the Roberts Court's pro-business label was meritless—a development perhaps typified by *The Washington Post* headline: Court Defies Pro-Business Label.[8] A string of decisions negative to business interests fueled this conclusion, and made clear that the pro-business allegation was either premature, overblown, or both.

A non-comprehensive list of the most important cases in which the Supreme Court ruled adversely to business interests includes notably:

- *Wyeth v. Levine*,[9] in which the Court held that plaintiffs may sue a drug manufacturer alleging inadequate warning of risk even when the warning label was approved as sufficient by the Food and Drug Administration;

- *Massachusetts v. EPA*,[10] in which the Court created a novel new rule for standing and opened the door for the EPA to regulate virtually every business (and non-business activity), including manufacturing, farming, and transportation, which produces carbon dioxide;

- *Federal Express v. Holowecki*,[11] in which the Court stretched the meaning of the word "charge" in order to allow an ADEA case to go forward where the plaintiff had not met the prerequisite of filing a formal charge with the EEOC as required by statute, but had filed an intake questionnaire;

- *Altria v. Good*,[12]in which the Court found that the Federal Cigarette Labeling and Advertising Act did not preempt lawsuits against tobacco companies based upon alleged misrepresentation under a state act which prohibits deceptive trade practices; and

---

[8]Robert Barnes, *Court Defies Pro-Business Label*, WASHINGTON POST, Mar. 8, 2009, *avail at* http://www.washingtonpost.com/wp-dyn/content/article/2009/03/07/AR2009030701596.html. *See also* Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943 (2009).
[9]555 U.S. ___, 129 S.Ct. 1187 (2009).
[10]549 U.S. 497 (2007).
[11] 552 U.S. 389 (2008).
[12]555 U.S. ___, 129 S.Ct. 538 (2008).

- *Burlington Northern and Santa Fe Ry. Co. v. White,*[13] in which the Court provided an expansive definition of the grounds for Title VII retaliation claims.

This term, the Court ruled adversely to business interests in significant cases, including:

- *Erica P. John Fund, Inc. v. Halliburton, Co.*, holding that class action securities plaintiffs need not prove loss causation to obtain class certification;

- *Williamson v. Mazda Motor of America, Inc.*, finding a state tort lawsuit was not preempted by federal auto safety standards;

- *Thompson v. North American Stainless*, holding that Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct, including firing the fiancée of an employee who complained about discrimination. This in a case in which four courts of appeals addressing the question went the other way.

- *Federal Communications Commission v. AT&T, Inc.*, finding that corporations do not have a right of personal privacy for purposes of Exemption 7(C) of the Freedom of Information Act, which protects from disclosure law enforcement records whose disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy"; and

- *Matrixx Initiatives, Inc. v. Siracusano*, finding that a drug company's failure to make public reports of adverse drug reactions can constitute securities fraud, even if the number of adverse reactions is not statistically significant.

Numerous other examples could easily be added to this list. Again, a simple counting game does not prove pro- or anti-corporate bias, but the listing of these cases demonstrates that it is simply not true to assert that the Roberts Court is consistently and blindly pro-corporation. And yet, even as additional cases adverse to business interests rolled in, the "story" of the conservative, activist, pro-business Roberts Court continued unabated—promulgated by liberal activists, trial lawyers, partisan agitators, gullible members of the press, and judging by these hearings, Members of this Committee.

To further this conservative, pro-corporatist fiction, in addition to cherry-picking cases, critics of the Roberts Court have also assiduously avoided 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. These cases include notably the Court's recent decision by Justice Ginsburg disallowing an action under federal common law seeking to limit greenhouse gases,[14] limiting the scope of the honest services fraud statute[15] in *Skilling v. U.S.*,[16] in which Ginsburg wrote the

[13] 548 U.S. 53 (2006).
[14] American Elec. Power Co., Inc. v. Connecticut, ___ U.S. ___, 2011 WL 2437011 (June 20, 2011).
[15] It should be noted that given the broad application of this statute, its implications extend far beyond businesses.

opinion of the Court, and in which three liberal justices on the Court (Sotomayor, Stevens, and Breyer) would have gone further, and granted the former Enron executive fair trial relief; the limitation of punitive damages in maritime law in *Exxon Shipping Co. v. Baker* [17] (authored by Justice Souter); the *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,*[18] decision (authored by Justice Ginsburg and joined by, *inter alia*, Justices Souter and Breyer), which raised the standard for pleading scienter in securities actions; and from the Rehnquist Court, *BMW v. Gore*[19]—an activist case finding a constitutional limitation on punitive damages in a decision authored by Stevens and joined by, *inter alia*, Souter and Breyer. Unless we are to believe that the most liberal members of the Court are in fact conservative, pro-business activists, this "story" quickly falls apart.

It is worth noting that the pro-corporatist myth is just a subspecies of the larger, "conservative activist" complaint leveled by some Members of the Committee and liberal activists against the Court—a phenomenon which, so the story goes, has intensified since *Bush v. Gore*. But as my colleague Todd Gaziano has persuasively argued, this too is a myth belied by the regrettable facts of the Court's string of liberal decisions.[20] In areas including national security law, the death penalty, the constitutionality of life sentences without parole for violent juvenile offenders, and the use of foreign law, this Court simply cannot be meaningfully dubbed "conservative," and certainly not in any reliable or predictable way.

No "Barrier" to Justice or Accountability: *Janus Capital Group*

Of the business cases decided this term, one that has been singled out for criticism is *Janus Capital Group, Inc. v. First Derivative Traders*. Contrary to the critiques, the decision is not a barrier to justice or accountability. Rather, it is an example in which creative trial lawyers advanced novel arguments in an attempt to push the boundaries of the law for their own advantage—hardly a case in which the Court reduced the availability of legal relief. Perhaps most importantly, current law is more than adequate to provide access to justice for meritorious claimants, and proper incentives for corporations.

In *Janus Capital Group, Inc. v. First Derivative Traders*, the Court held that a mutual fund investment advisor cannot be held liable in a private action for false statements made in prospectuses by an investment fund that operated as a separate legal entity. This case is yet another attempt to expand the implied private right of action under Rule 10b-5. If this sounds familiar, it should. The Court has consistently resisted attempts to expand the implied right of action under 10b-5.[21]

---

[16] ___ U.S. ___, ___ S.Ct. ___, 2010 WL 2518587 (June 24, 2010).
[17] 554 U.S. ___, 128 S.Ct. 2605 (2008).
[18] 551 U.S. ___, 127 S. Ct. 2499 (2007).
[19] 517 U.S. 559 (1996).
[20] Todd Gaziano, *What Conservative Court?*, TOWNHALL 49 (July 2010).
[21] *See* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) and Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008).

This does not mean that there is no remedy for fraud committed by aiders and abetters: Congress has given that authority to the SEC.[22] In the Private Securities Litigation Reform Act, Congress sought to "remov[e] the plaintiffs' class action bar from the equation" by granting the SEC, but not private litigants, the authority to prosecute aiders and abetters who provide "substantial assistance" to those engaged in fraud.[23]

The critics' claims therefore appear to be reducible to the principle that in order to have proper incentives for corporate conduct and adequate compensation for victims of fraud, the proper enforcement mechanism must be private actions, not the SEC. But this is simply false. As Professor John Coffee has persuasively argued, securities class actions inevitably "produce wealth transfers among shareholders that neither compensate nor deter . . . ."[24] Furthermore, Congress made significant findings about the costs associated with class action securities litigation when passing the PSLRA—costs our economy can ill-afford. Thus, while Congress could expand the private cause of action to encompass the kind of claims at issue in *Janus*—in what would be an expansion previously not recognized—this would not accomplish the goals of increasing accountability or producing proper corporate incentives, but it would constitute a substantial benefit to a special interest—the trial bar.

Conclusion

This term, the Supreme Court once again issued a series of mixed decisions affecting corporations, and has continued to defy easy labels in areas of interest to business such as preemption. Claims that the Roberts Court is biased in favor of corporations are belied by the actual decisions of the Court. The real story of this term's criticized business cases is largely novel claims by trial lawyers that the Court was right to reject based upon the laws that Congress had written. If Congress disagrees on a question of statutory interpretation, it can modify the statutes. But it should not do so where, as in cases like *Janus*, the law operates effectively as written, and any modification would do little but aid special interests.

---

[22] See 15 U.S.C. §§ 78u-3.
[23] 4 Bromberg & Lowenfels, Securities Fraud & Commodities Fraud § 7:308, at 7-506 (2d ed. 2006).
[24] John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1535-36 (2006).

****

The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work.

The Heritage Foundation is the most broadly supported think tank in the United States. During 2010, it had 710,000 individual, foundation, and corporate supporters representing every state in the U.S. Its 2010 income came from the following sources:

Individuals	78%
Foundations	17%
Corporations	5%

The top five corporate givers provided The Heritage Foundation with 2% of its 2010 income. The Heritage Foundation's books are audited annually by the national accounting firm of McGladrey & Pullen. A list of major donors is available from The Heritage Foundation upon request.

Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own and do not reflect an institutional position for The Heritage Foundation or its board of trustees.