

### Statement of Senator Cornyn

This Committee should be exploring ways to reduce the incidence and costs of frivolous litigation. Instead, today we are discussing whether to make it easier to file frivolous suits. This is regrettable. We should not be holding this hearing. Far from “limit[ing] Americans’ access to courts,” the Supreme Court’s decisions in the *Iqbal* and *Twombly* cases upheld the unremarkable principle that plaintiffs should not be able to sue somebody unless they have a plausible factual basis for doing so.

The decisions were correct and consistent with longstanding case law. They stand for the simple proposition that you have to have a reason to sue somebody. This is common sense to everybody but a handful of left-wing special interest groups.

Seeking to reverse these common-sense decisions, Sen. Specter has introduced S.1504, the Notice Pleading Restoration Act of 2009. This bill is premature and unwise. At best, the bill is premature—it seeks to reverse a Supreme Court case that was released just over 6 months ago and that is only starting to be applied. The Judicial Conference is carefully studying the effect of these cases on pleading standards, and if any changes are needed, they should be based on the considered, studied judgment of the Judicial Conference pursuant to the Rules Enabling Act.

But we know that the Specter bill would make it easier for trial lawyers to file frivolous lawsuits without a factual basis, and easier for suspected terrorists to sue American military and law enforcement officials.

The Specter bill would make it easier than it has ever been to file a frivolous lawsuit. Only frivolous lawsuits are affected by the *Iqbal* and *Twombly* decisions. If a plaintiff cannot even articulate facts that, if true, would plausibly establish liability, then the plaintiff should not be allowed to waste the time and money of the court and the defendant in onerous and frivolous litigation.

Plaintiffs’ lawyers would prefer to be able to bring a lawsuit even without a factual basis. If they can merely survive a motion to dismiss, then trial lawyers can compel defendants to engage in the costly discovery process in the hopes of happening upon a plausible legal theory, or extracting a settlement from a defendant who would rather make the frivolous case go away than go to the expense of defending it.

As a former Texas District Court judge and Supreme Court justice, I strongly believe that our courts exist to right wrongs, not to empower trial lawyers to conduct unfounded fishing expeditions or extract nuisance-value settlements. If plaintiffs cannot articulate the wrong that was committed against them, then they should not be able to exploit the civil justice system for profit. Lawsuits without a factual basis benefit nobody but the trial bar, and should be dismissed.

But worse than encouraging frivolous lawsuits, the Specter bill would also make it easier for our enemies to sue military, law-enforcement, and administration officials for carrying out their official duties. The *Iqbal* case to which the Specter bill is a response was an attempt by a Pakistani suspected terrorist to sue Attorney General John Ashcroft and FBI Director Robert Mueller. Javid Iqbal was arrested in New

York shortly after the 9/11 attacks on criminal charges to which he pleaded guilty. He was determined by the FBI to be "of high interest" in the 9/11 investigation. After he was cleared of involvement in the 9/11 attacks and returned to Pakistan, Iqbal sued 34 current and former federal officials alleging that they had discriminated against him based on his race, religion, and national origin. Iqbal sued Ashcroft and Mueller despite that he did not cite any facts that could plausibly support the conclusion that they had impermissibly discriminated against him. Iqbal's claims lacked a basis in fact, and they were rightly rejected by the Supreme Court.

The natural effect of the Specter bill's overturning the *Iqbal* decision would be that, in the future, terror-suspect detainees could more easily sue top-level law enforcement and administration officials for detaining them. The Specter bill would make these cases very difficult to dismiss. At a time that the administration is pursuing an ill-conceived strategy of giving foreign terrorists access to domestic courts for their criminal trials, the Specter bill would compound this error by giving terrorists access to domestic courts to bring frivolous civil suits as well. I find this unfathomable and unjustifiable.

I will oppose the Specter bill, and regret that it is receiving a hearing in this Committee.