

Statement of
The Honorable Sheldon Whitehouse

United States Senator
Rhode Island
December 2, 2009

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Hearing, "Has the Supreme Court Limited Americans' Access to Courts?"
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Thank you, Chairman Leahy, for holding this hearing and for being a tireless defender of access to justice. And thank you also to Senator Specter for your leadership on the need to restore notice pleading after the Supreme Court's decisions in *Bell Atlantic v. Twombly* and *Iqbal v. Ashcroft*. I look forward to working with you both.

I think that two points are worth particular consideration as we look at this crucial issue.

First, as dry and technical as this issue may seem, the decisions in *Twombly* and *Iqbal* impose real economic costs on ordinary Americans. Consider the employment discrimination victim who - because the discriminator hides the reason for her firing behind a veil that only discovery can penetrate - can only allege in conclusory terms that her employer fired her for discriminatory reasons. Under the new rules of *Twombly* and *Iqbal*, that plaintiff, with a meritorious case, never will get the chance to find the smoking gun email that proves her claim. In creating this courthouse Catch-22, *Iqbal* and *Twombly* overturned decades of Supreme Court precedent, and regular Americans lost out.

Second, we may hear today that overruling *Twombly* and *Iqbal* would pose a threat to national security. I've been sued enough to agree that meritless civil litigation should not distract government officials from their weighty responsibilities, but I have yet to see meaningful evidence that lawsuits were putting an undue burden on government officials before the conservative activists on the Supreme Court rewrote the law: a 5-4 Court changed the rules of civil procedure by judicial fiat. Nor do concerns about national security justify restricting access to justice for every type of plaintiff: closing the courthouse doors to employment discrimination plaintiffs does not advance national security even if it does satisfy big corporations' political agenda.

Congress gave the Courts a clear process, subject to congressional approval, for changing the Federal Rules of Civil Procedure. The Supreme Court ignored that process, not to mention its own precedents, and "legislated from the bench." We must correct their error.

Thank you.