



## A Tale of Two Courts: Comparing Corporate Rulings by the Roberts and Burger Courts

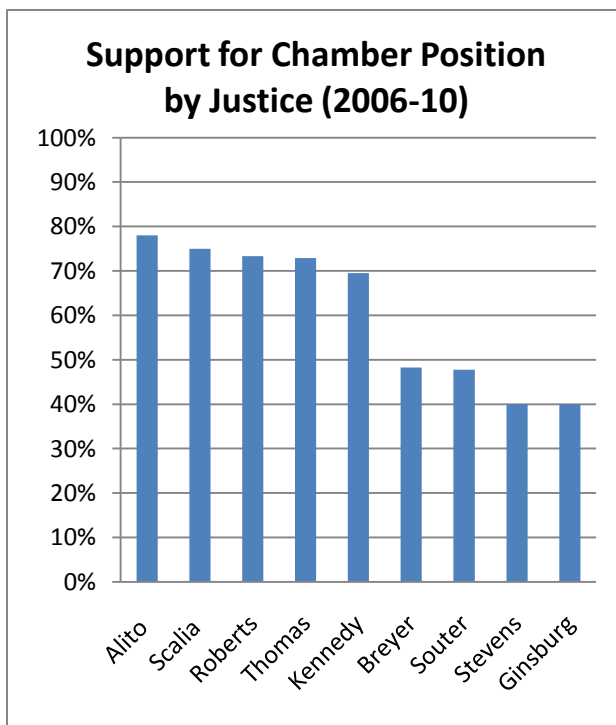
In June 2010, Constitutional Accountability Center released [\*The Roberts Court and Corporations: The Numbers Tell the Story\*](#), a study of the voting patterns of the Supreme Court in cases involving the interests of big business. We found that (1) the U.S. Chamber of Commerce won 68% of the cases in which it had participated since Justice Samuel Alito joined the Court in January 2006, and (2) this success rate was mainly a product of a cohesive conservative majority consisting of Chief Justice John Roberts and Justices Alito, Anthony Kennedy, Antonin Scalia, and Clarence Thomas, which, collectively, voted for the Chamber 74% of the time. In comparison, the Court's liberal/moderate bloc voted for the Chamber 43% of the time.

To answer a question raised by, among others, Justice Stephen Breyer, about whether this success by the Chamber is a new development, we decided to compare the success of the Chamber in the Roberts Court to its success in the five terms before Justice Scalia joined the Court in 1986, a comparable period of stable Court membership that was bookended by Justice Sandra Day O'Connor joining the Court in 1981. During this earlier five-year period, the Chamber lost more cases than it won (winning 15 of 35 cases, a win percentage of 43%) and there was no similar division along ideological blocs on the Court in business cases. In other words, both the pro-corporate tilt of the Supreme Court today and its sharp ideological divide in favor of the Chamber are relatively new developments, traceable to membership changes in the Court's conservative majority.

### The Chamber and the Roberts Court, 2006-2010

The Supreme Court's 5-4 decision this past January in *Citizens United v. Federal Election Commission*, holding that corporations have the same constitutional right as individuals to spend money to influence elections, has focused a national spotlight on the rulings of the Roberts Court in cases involving the interests of big business and led to charges that the conservative majority on the Roberts Court is being "activist" in favoring corporate interests. To test empirically the idea that the five conservatives on the Roberts Court tend to side with corporate interests, CAC earlier this year examined cases in which the U.S. Chamber of Commerce participated as a party or as an *amicus curiae*. We looked at opinions released by the Roberts Court since Justice Alito began participating in decisions in early 2006 through the end of June 2010.

Over that period, a cohesive five-Justice majority produced victories for the Chamber in 68% of its cases.



The Chamber was even more successful in the October 2009 term than it was in the overall period we studied, winning over 80% of its cases (13 of 16).

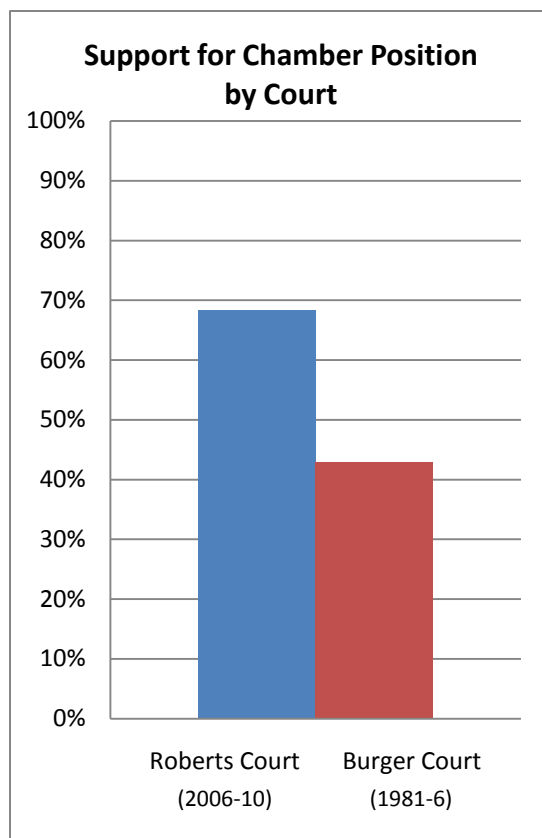
The Court's conservative majority (Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas) were similar in their overall support for the Chamber's position. The least supportive of this group, Justice Kennedy, supported the Chamber 69% of the time, nearly as often as Justice Alito, who had the highest percentage support for the Chamber at 78%. The Court's moderate/liberal bloc (including former Justice David Souter, who was on the Court for most of these rulings) was more centrist, collectively casting 43% of its votes in favor of the Chamber.

### The Chamber and the Burger Court, 1981 -1986

In a recent story by Bloomberg News, Justice Breyer responded to the assertion that the Roberts Court rules frequently in favor of the interests of the U.S. Chamber of Commerce. He is quoted as saying "I looked back" and "I couldn't find a tremendous difference in the percentage of cases. They've always done pretty well."<sup>1</sup> But examining the time period immediately before any of the members of the Court's current conservative majority took the bench tells a very different story.

This study comprehensively examines five Supreme Court Terms, beginning in October 1981, when Justice Sandra Day O'Connor joined the Court, and ending in June 1986, just before the first member of the Court's current conservative bloc, Justice Antonin Scalia, joined the Court. During this period, at the end of Warren Burger's tenure as Chief Justice, the Court ruled in the Chamber's favor just 43% of the time (15 victories in 35 cases), a stark contrast to the Chamber's success rate in the Roberts Court of 68% (41 victories in 60 cases).

The Burger Court, during the period of our study, was also dramatically less polarized by corporate cases than it is today. As noted above in our study of the Roberts Court, the average level of support for Chamber positions among the Court's conservative bloc was 31 points higher than the average support for the Chamber by the Court's moderate/liberal bloc (74% to 43%). There simply was not a similar ideological division revealed in our study of the Burger Court. For example, the voting records of then-Justice William Rehnquist, widely viewed as the most conservative member of the Burger Court, and Justice William Brennan, probably its most liberal member, differed by only three points – 46% Chamber support compared to 43%, respectively. Even Justice Lewis Powell – who worked for the Chamber before joining the Court, writing a now famous memorandum urging the Chamber to take advantage of a "neglected opportunity in the courts"<sup>2</sup> – only

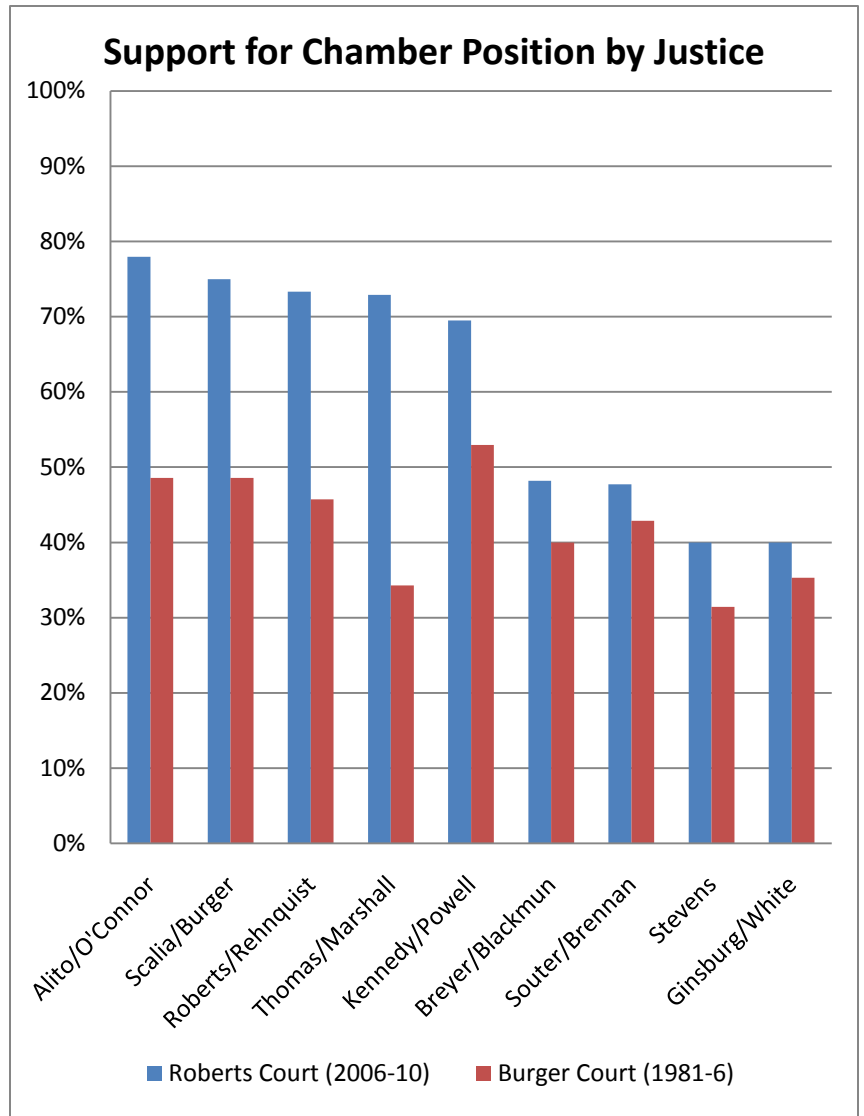


<sup>1</sup> Greg Stohr [Breyer Says U.S. Supreme Court Doesn't Have Pro-Business Slant](#), Bloomberg, October 7, 2010.

<sup>2</sup> [http://www.reclaimdemocracy.org/corporate\\_accountability/powell\\_memo\\_lewis.html](http://www.reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html)

supported the Chamber’s position 53% of the time, the highest percentage of any member of the Court during that period.

These numbers are even more dramatic when one compares the support of the current Justices for the Chamber’s positions with the votes during 1981-1986 of the Justices they succeeded. The graph to the right shows that each member of the Court’s conservative majority is considerably more favorable to Chamber positions than the Justice he replaced. For example, Justice Powell’s successor, Justice Anthony Kennedy, now considered the “swing” vote on the Court, voted 16% more frequently in favor of the Chamber than did Justice Powell, the Burger Court’s most pro-corporate jurist, during the periods studied. Chief Justice Roberts voted for the Chamber 73% of the time from 2006-2010; then-Justice Rehnquist voted for the Chamber only 46% of the time between 1981 and 1986. Most dramatically, Justice Clarence Thomas voted for the Chamber more than twice as frequently than his predecessor Justice Thurgood Marshall did during the periods studied (73% to 34%).



There is one important caveat that should be added to all of these numbers. We do not attempt in this study of Burger Court rulings or in our prior study of Roberts Court rulings to identify how often the Chamber “should” have won. We did not, in other words, seek to make a subjective determination of how frequently the Chamber had it right on the law, as it surely did in some percentage of these cases. And because the Supreme Court has a significant amount of control over what cases it decides to take, it is possible that the more conservative Roberts Court has taken more cases that the Chamber “should” win than did the less easy to pigeonhole Burger Court. Some part of the shift towards the Chamber’s position, in other words, may be attributable to the way the Court shapes its own docket. In this respect, Justice John Paul Stevens – the only Justice on the Court in both periods studied – is perhaps a good control. The nine-point rise in Justice Stevens’ voting for the Chamber suggests that indeed there were more cases that the Chamber “should” have won in our study of the Roberts Court than in this study of the Burger Court. But this nine-point change in Justice Stevens’ voting in the two studies

(roughly matched by a similar increase in the voting percentage for the Chamber by other members of the Court's liberal/moderate bloc in comparison to the votes of their predecessors) does not come close to explaining the Court's dramatic 25-point shift towards the Chamber's position in the study of the Roberts Court. And, even more significant, it does not begin to explain the emergence of a sharp ideological divide on corporate cases in the Roberts Court that simply did not exist on the Burger Court during the examined period. (Read more about the methodology of this study here: <http://theusconstitution.org/blog.history/wp-content/uploads/2010/10/Burger-Chamber-Study-METHODOLOGY-FINAL.pdf>.)

## Conclusion

This study of the rulings of the Burger Court in cases involving the U.S. Chamber of Commerce from 1981-86, like our prior study of the rulings of the Roberts Court, provides only a snapshot in time. It documents a five-year period when the Chamber prevailed in slightly less than half of the cases in which it participated, compared to the 68% success rate it has enjoyed in recent years. As important, this study documents a period during which an ideological divide in Chamber cases, which characterizes the Court's recent rulings in such cases, did not really exist. This study thus bolsters the impression left by our study of the rulings of the Roberts Court that the success of the Chamber is something relatively new and troubling. For the same reasons, this study undercuts the impression left by Justice Breyer's recent remarks to Bloomberg News that dismiss the Chamber's success as nothing new.

We also recognize, however, that a more comprehensive study filling in the gaps between these snapshots and covering every ruling in every case involving the Chamber over the last 30 years would provide a richer understanding of how the Court has changed over time. It is possible, likely even, that such a comprehensive study would show a gradual increase in the support of the Court for the Chamber and thus provide some support for Justice Breyer's assertion that the Chamber of Commerce has enjoyed considerable success before the Court for at least as long as he has served on the Court. While that broader study is underway, we already know this: there was a time not that long ago when the Court neither tilted in the Chamber's direction nor divided sharply along ideological lines in cases involving corporate interests.