

Bench Memos

NRO's home for judicial news and analysis.

[ABOUT](#) | [ARCHIVE](#) | [E-MAIL](#) | [LOG IN TO COMMENT](#)

Leahy Stacks Deck for Hearing (and Still Loses)

By [Hans A. von Spakovsky](#)

Posted on July 01, 2011 12:48 PM

NRO contributor Robert Alt (a colleague of mine at Heritage) did us proud on Wednesday when testifying at the show trial — er, I mean, hearing — called by Senate Judiciary Committee chairman Patrick Leahy (D., Vt.).

How stacked was this hearing? Consider its title: “Barriers to Justice and Accountability: How the Supreme Court’s Recent Rulings Will Affect Corporate Behavior.” As ranking Republican member Charles Grassley (Iowa) noted in his opening statement, the very title suggested a predetermined conclusion. This was fated to be just another lame attempt to bash conservatives on the Court as “pro-business.”

Along with Andrew J. Pincus, an attorney at Mayer Brown, Robert appeared for the minority. His opening statement obviously annoyed Leahy, who interrupted him to criticize his supposed sarcastic tone.

Now, those who know Robert or who have read him in NRO know that he can certainly be sarcastic at times. But there was no trace of sarcasm in his opening statement. Robert was simply disagreeing with the premise set out by Leahy and pointing out that the chairman’s assertions about the Court were not supported by the facts. Apparently, proving that Patrick Leahy is wrong (a not infrequent occurrence) is being sarcastic.

Robert cited case after case in which the Supreme Court ruled against corporations and businesses. Certainly he won no brownie points in saying that Leahy was pushing a “pro-corporatist fiction” about the Roberts Court. In addition to cherry-picking cases, Robert noted, critics of the 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.”

Pincus raised the ire of both Leahy and Sen. Al Franken (D., Minn.) by pointing out that in the just-concluded term, the Supreme Court ruled against corporations in nine cases and ruled in favor of corporations in nine cases. Irked to hear that the term yielded a tie game between businesses and plaintiffs, Leahy got himself in more trouble by asking, “Well, what about prior terms of the court?” Corporations and businesses did even worse in prior terms, Pincus answered.

Leahy called three witnesses to make his case. Two were law school professors: Melissa Hart from the University of Colorado and James D. Cox from Duke University. This pair demonstrated why Walter Olson has called law schools “schools for misrule.”

When discussion turned to the Supreme Court’s recent decision throwing out a class-action lawsuit against Walmart, Professor Hart gave one of the silliest examples of a supposedly discriminatory policy that I have ever heard. Walmart discriminates against women, she asserted, because it requires that managers be willing to relocate. I was sitting between two women in the audience of the hearing room and when Hart said that, they both turned to me with looks of total confusion.

Professor Cox’s testimony was emotional and over-the-top. It was hard to believe that he has written a security law textbook used in law schools all over the country. His basic argument was reducible to the claim that all corporations are evil and just out to despoil and loot the public.

This hearing showed how the minority can hijack a hearing called by the majority if they choose good witnesses who are willing to confront the majority members and not back down. On Wednesday, Alt and Pincus totally destroyed the fiction which the majority was trying to project to the public. Hopefully, we will see more of that kind of competent hearing management in the future.

— *Hans von Spakovsky is a senior fellow in the Heritage Foundation’s Center for Legal and Judicial Studies.*

[PERMALINK](#)