

Bork Hearings a Lesson In Irony, Not Civics

The political bromide lately seems to be that the Senate Judiciary Committee's hearings on the nomination of Robert Bork to the Supreme Court provide a fascinating lesson in the functioning of our Constitutional system. Given the frequent distortions, misrepresentations, and just plain lack of understanding exhibited, I can't say much for their value as a civics lesson. The hearings certainly were fascinating, however; as a study in irony.

Irony No. 1: What is the main criticism of Bork brought by the Senators opposed to his nomination? Why, that he is unwilling to read the Constitution in a way that continually expands our individual liberties and our protection from governmental oppression. Their opposition to Bork is based on his refusal to strike down offensive legislation, whether state or federal, without an explicit basis in the text of the Constitution or the original intent of the Framers. But who is it that makes this offensive legislation? Members of the state legislatures, Congressmen, and *Senators*. It seems that the main complaint of the Senators opposed to Bork is that he is not willing enough to undo what they do. This leads immediately to . . .

Irony No.2: The spectacle of politicians inadvertently speaking the truth about our political system. The essence of what the senators opposed to Bork are saying is that we need protection against the democratic process. Their objection to Bork is that he disagreed with rulings that struck down laws banning the use of contraceptives, prohibiting a grandmother from living with her grandchildren, and requiring a poll tax, all of which, like the laws segregating the races, were democratically enacted. Here we have politicians who spend their careers demagoging about the will of the people (read: the majority of the voters) and using the terms "democracy" and "freedom" as though they were identical in meaning now telling us that not only aren't these terms synonymous, but they're actually antithetical, *and that freedom is the more important value*. I venture to say this is the last time you will hear people who are democratically elected to a position where they can pass laws regulating human behavior—that is, restricting freedom—say this. They certainly will not remind you of it the next time they propose a bill requiring you to wear a seat belt, preventing you from buying imported products at market prices, instituting mandatory national health insurance, or prohibiting you from viewing "smut." This, of course, brings us to . . .

Irony No.3: If a Supreme Court justice acted as the Senators opposed to Bork seem to want him to, they probably would bring a bill of impeachment against him. What if Bork had been on the Court when cigarette advertising was banned from television and read the right to freedom of speech expansively to protect commercial speech, and so voted to strike down the ban? Do you think this would be characterized by the Senators opposed to Bork as a laudable blow for individual liberty or as an example of his pro-big-business bias? How do you think the Senators who voted to strengthen federal anti-drug legislation during last year's "war on drugs" would feel about a Justice who overturned those laws on the ground that the right to privacy should be expanded to not only allow women to take unwanted tissue out of their bodies, but also to allow individuals to put whatever they want to in? How do you think Senator Kennedy would characterize the actions of a Supreme Court Justice who read the First Amendment right to freedom of association expansively so as to strike down the Civil Rights Act of 1964? Do you

think he might call such a Justice a racist “in whose view of America there is no room for blacks at the lunch counter?” Personally, I have to believe that Senators would be a little upset with a who strikes down their hard-fought legislation on the basis of a desire to expand individual rights beyond what is explicitly granted by the Constitution.

Is there a lesson that can be gleaned from the Bork hearings? Perhaps. Because if you listen closely enough to any thoughtful discussion of the Constitution, you might be able to hear the echoes of the principles upon which the national government was founded. And those would tell us that the Federal government was not designed to be a democracy, but a government of explicitly limited powers with democratically elected functionaries and that the Bill of Rights, whose purpose is to guarantee our individual liberties, is specifically anti-democratic in nature. And from this we might infer that the Constitution tells us that individual liberty is more important than democratic majority rule and realize that what is wrong with our country is that our democratically elected officials are wielding too much power.

I would like to think that some of the Senators opposing the Bork nomination will listen to the things that they themselves are saying and will see the irony of their position. It would be nice to think that some of them might recognize that the only reason for favoring judicial activism is that it is necessary to protect us from them. But, of course, now it is I who am being ironic. After all, when was the last time you heard an elected official admit that what was wrong with the country was that he or she had too much power?

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