Additional examination required in the confirmation of Robert Bork

by Lyndon Hermyle LaRouche, Jr.

On Sept. 21, presidential candidate LaRouche authored the following testimony for formal submission to the Judiciary Committee of the U.S. Senate, under the title, "Additional Examination Required in the Matter of the Confirmation of the Supreme Court Appointment of Robert H. Bork."

I am Lyndon Hermyle LaRouche, Jr., currently a resident of Loudoun County, Virginia, and a qualified, and currently campaigning candidate for the 1988 U.S. presidential nomination of the Democratic Party.

I ask the Senate Judiciary Committee, and the whole body of the Senate to reconsider the lines of questioning of Judge Robert H. Bork so far. Although the hearing has been a protracted and perhaps even a grueling one, I believe we have not yet heard an adequate exposition of the nominee's philosophy of law, nor have we adduced meaningful foresight into the nominee's view on crucial topics likely to be of foremost importance in the Federal Court's business under the next elected President of the United States.

The President of the United States to take office in January 1989 will be faced with the gravest crises in our nation's experience during this century to date. Leading bankers of the world, in increasing numbers, have warned that we are at the verge of the worst international financial crash in history. We do not know the date at which such a crash might erupt, but it is likely this will occur either before or shortly after the January 1989 inauguration. These financial and associated monetary crises will aggravate greatly the problems of foreign policy and strategic policy. In addition, we face the greatest social crisis in our nation's history, the so-called AIDS pandemic.

The next President will be confronted with a challenge more awesome than the monetary, economic, social, and strategic crises facing President Franklin Roosevelt over the ten-year period 1933-43. The next administration will be a watershed in not only the history of our republic, but the history of the world as a whole.

Under our Constitution, and under emergency legislation available, the next President and Congress will have available to them adequate means to overcome these crises, and to accomplish this without upsetting our constitutional system of representative self-government. However, the next President and Congress will be obliged to take many actions which go to the bedrock of our constitutional system. These actions will be considered highly controversial in some important circles, and, like the actions taken in time of crisis under President Franklin Roosevelt, will undoubtedly become subjects of actions before our federal courts.

I propose that both the Judiciary Committee, and the whole Senate, must examine the implications of Robert H. Bork's nomination in the light of the circumstances under which he would serve if confirmed. We may not be able to foresee the particular actions brought before our Federal Court, but we are able to foresee with reasonable accuracy the principled character and importance of the questions likely to come before that Court.

I propose, therefore, that it is important to query the nominee in these areas, and to adduce the nominee's philosophy of constitutional law in these terms of reference. To that purpose, I summarize some of the most clearly foreseeable issues of statecraft which will be placed before the Court in one or another form.

Article I

The financial crash now looming involves an estimable $14 trillion of financial paper exposed to international markets, of which about half involves the combined public and private credit of the United States. The President and Congress will face the challenge of ensuring that the most essential institutions of public and private credit are efficiently defended. No private agency, or combination of national and international private or supranational agencies, will be capable of dealing with the implications of a crisis of such a magnitude; only governments can. Without appropriate action by the U.S. government, Western civilization would slide into the deepest and most prolonged economic depression since 14th-century Europe.

The next President and Congress will be obliged to defend several specific institutions of public and private credit:

1) Defense of the value of the U.S. dollar;

2) Defense of the value of the public debt;

3) Defense of the integrity of the private banking system;

4) Defense of the principal value of bank deposits at par over the medium-term interval of reorganization of the private banking system.

The government does not have the means to support the nominal values of other private financial assets, and would only bankrupt government itself hopelessly should it attempt

to do so. However, unless the four priorities listed are addressed, it would be impossible to prevent incalculable chaos, and impossible to organize an economic recovery over the medium-term.

The means available to defend these priority values are provided as the constitutional regulatory powers of the federal government, as currently amplified by provisions of Federal Emergency Management Agency (FEMA) legislation.

The only means for organizing an economic recovery, under our constitutional law, is emergency action which transforms the Federal Reserve System de facto into a national bank echoing the precedents of the Bank of the United States and the Second Bank of the United States. The power to issue currency must be withdrawn from the Federal Reserve System, and returned to issuance of U.S. Treasury currency-notes as authorized by Act of Congress.

Several trillions of dollars of such currency-notes will be required over the term of the next President. These notes will be issued through the Federal Reserve System, in the form of low-interest loans issued chiefly through participating private banks of the national banking system. These loans will be issued in a manner analogous to war-production loans during World War II. They will be restricted to several classes of applications: job-creating loans for technologically progressive capital-intensive investments in production of physical output, for export loans, for scientific and related research and development, and as capital loans to federal, state, and local capital accounts and capital accounts of utilities and public authorities for rebuilding and improving the nation's basic economic infrastructure.

The general purpose of these loans is threefold:

1) Expand the tax-revenue base of federal, state, and local government through economic expansion;

2) Increase the level of per capita physical output and productivity;

3) Generate a new debits-base in the banking system, to foster successful financial reorganization of that system.

Each of the indicated actions must be taken as emergency actions, and implemented with the speed and effectiveness such an emergency implies. Delays could result in monstrous calamities for the nation and its people.

The President, if he grasps the situation adequately, will be obliged to issue a wide range of legislation to the Congress, asking the Congress for special cooperation in returning enacted legislation in these matters rapidly, and as clean bills. Most of this legislation must be so enacted by the conclusion of the first 60 to 90 days of the next administration.

This legislation will include provisions superseding much outstanding legislation and Federal Court decisions, epsecially in areas in which such outstanding legislation would impede implementation of the kinds of emergency actions I have indicated.

This indicates broadly the area in which actions are most likely to come before the Federal Court. The philosophy with which that Court approaches such actions, and the matter of the promptness with which those actions are brought to a conclusion, are of the utmost concern. Obstruction and delays could cause the gravest calamities for the nation.

Philosophy of law

Under Chief Justice John Marshall, there would have been no great difficulty in securing prompt and proper resolution of the kinds of actions such emergency measures might bring before the Federal Court. Unfortunately, the received opinion on constitutional law has been greatly altered during the course of the present century. Lately, practiced opinion has been shifted in the direction of the Romantic philosophy of law famously associated with Karl Marx's Berlin law professor, Karl Friedrich Savigny. The standpoint in natural law, upon which our Declaration of Independence and federal Constitution were premised, has been greatly eroded.

As we have seen afresh in the course of these hearings, both within the hearings and in the public clamor surrounding the proceedings, the authority of natural law, as our Founding Fathers recognized it, has been supplanted by the irrationalism of rather arbitrary ideologies, some of the latter attributed to the "right wing," others attributed to the "left wing." This tendency to substitute the irrational emotionalism of ideology for intelligible principles of natural and constitutional law, appears to have become a kind of reigning political obsession within our nation and its institutions.

I wish to appeal to the deepest part of the consciences of the Senators on this point. Let us put ideologies to one side. Let us reckon that under conditions of grave crisis, the substitution of conflicting ideologies for natural law, by undermining the principle upon which our Declaration of Independence and Constitution were premised, might probably foster a circumstance in which our system of representative self-government itself might crumble, and our government assume novel forms abhorrent to us in their consequences.

Inasmuch as the next appointment to our Supreme Court will have a marked influence on the Court's deliberations during the period of the coming crises, the matter of the confirmation of Robert H. Bork has a momentous importance, an importance perhaps much greater than any recent preceding case.

What is Robert H. Bork's philosophy of statecraft? What do the words "natural law" and "constitutional law" signify for his future practice? How would he view the kinds of emergency actions confronting the next President and the next Congress? What systematic, intelligible principles of natural law would he bring to bear in deliberating such causes of action?

I believe that I fairly represent the viewpoint of such authors of our republic as Benjamin Franklin, George Washington, and Alexander Hamilton, in reporting that our founders' notion of natural law was congruent with the influence of such as John Milton, Samuel Puffendorf, Gottfried Leibniz, England's Dean Jonathan Swift, and Harvard Universi-

ty's Cotton Mather. Moreover, the citizens who were persuaded to follow the *Federalist Papers* in adopting our Constitution, were of a quality envied around the world as the American "Latin farmer," sturdy yeomen steeped in study and admiration of the Greek and Latin classics, as well as the beautiful and true language of the King James version of the Bible.

At the time of its appearance, our young republic was justly described as a temple of liberty and beacon of hope for all mankind. Our republic was an enterprise made successful by aid of like-minded friends throughout Europe, friends who were persuaded that the success of our cause was a most invaluable change in the composition of political life upon this planet as a whole. Our young republic, whatever its shortcomings, was produced as a distillation of the new form of Judeo-Christian statecraft introduced to Western Europe through the influence of the writings of St. Augustine, and embodying the lessons of every great struggle for civil and religious liberty since Solon of Athens and Socrates.

St. Augustine's ecumenical significance for the fraternity of Catholic, Protestant, and Jew today, is that he applied the principles of Christianity to establish a new form of state, rejecting the evil that was Roman law, and embodying a new form of society premised upon that notion of the sacredness of the individual personality specific to Christianity, but also

shared by that great friend and collaborator of St. Peter, Philo, called "Judaeus" of Alexandria.

For us, man is placed by the Creator above the nature of the beasts, and distinguished from the beast in practice by that divine spark of potential for reason embedded in each of us at birth. On this account, all men are created equal before the Creator, and equally entitled to the protection of justice ordered by law properly common to all nations. Our nation avowed its independence by explicit appeal to that higher body of natural law, a law higher than all governments, all treaties, and all bodies of popular opinion.

The right of every nation, of each and every person, to the protection of such natural law, is supreme, and must be caused to prevail against any contrary statute, treaty, or body of popular opinion.

We each exist for a purpose, a purpose manifest in the progress of man, through aid of scientific and technological progress, from a grubbing food-gatherer, to a people capable of increasing the abundance and quality of human life. As we each contribute through our labor to the improvement of the abundance and quality of life of present and future generations, we each know that our mortal existence is thus made not only a useful thing, but something in some degree necessary to all mankind.

Yet, we are each fragile existences, and our individual life a very brief one. To fulfill the proper meaning of our individual existence, we depend upon society. We depend upon society to foster the development of our powers to do good, we depend upon society to afford us the opportunity to contribute good, and we depend upon society to adopt the good we contribute and to preserve that good for the advantage of present and future generations. Such is the essence of government under natural law.

Just as the physical laws of the universe are discernible to reason with decreasing imperfection, so, once we grasp the sacredness of the individual personality, and the relationship between the individual and society in this way, we are able to render intelligible the proper cause-effect relationship between the state and the individual. This intelligibility constitutes the natural law, to such effect that if we defy it, we place ourselves, our nation, in defiance of the Creator, and bring upon ourselves those calamities which are inherent in defying the laws which the Creator has built into the composition of our universe.

Do not blame the Creator if the condition of society is not a happy one. It is the Creator who holds each of us responsible, according to our powers and our talents, for what becomes of mankind. This potential culpability lies most heavily upon institutions and officials of government, and most emphatically, under our Constitution, upon the consciences of the justices of our Federal Court.

I have summarized these points to bring our attention to the matter at issue in the nomination of Robert H. Bork.

The issue of our 18th-century break with Britain was essentially the oppressive consequences of the rise of modern

British Liberalism beginning, especially, the accession of the monstrously corrupt Walpole as the prime minister of George I. That Liberalism defied the notion of natural law, substituting ideology in the form of what was deemed currently authoritative opinion for principles of natural law. This assault on natural law acquired greater and broader force during and following the 1815 Treaty of Vienna. The roles of two Berlin professors of that period, G.W.F. Hegel, and Karl Savigny, typifies that broader assault in a most influential way. During recent generations, it is the same Romantic dogma of Savigny upon which Karl Marx modeled his dogma of "historical materialism," which has most widely corrupted the philosophy of statecraft within our nation.

Do our justices understand and uphold the wisdom of the authors of our Declaration of Independence and Constitution on such accounts, or do they reject that wisdom because of some "right" or "left" version of a Romantic theory of statecraft and law?

This is reflected in the tumult around the Bork confirmation, where the supposed conflict between two ideologies, "right" versus "left," has displaced consideration of the true issues to be considered. For those not familiar with the case, I summarize.

Savigny is paradigmatic among those 19th-century innovators in philosophy of law who declared war against the entire tradition of Western Judeo-Christian civilization. Savigny declared natural law nonexistent, and sought to resume the model of Roman law and *Nicomachean Ethics* as the replacement for natural law. He insisted that there was no intelligible principle of law, but rather only a mysterious, irrational sort of shift in prevailing opinion, which latter he ascribed to a "popular spirit," which he termed, in German, the *Volksgeist*. We have seen Savigny's law fully brought to power in one notable recent instance, the code of irrational law of Nazi Germany. Soviet law is also derived, by route of Marx's "historical materialism," from Savigny's irrationalist dogma.

In the popular view of an ideological division between "right" and "left" on principles of law, as we have seen this surrounding the current hearings, we are faced with the opposition between two sets of arbitrarily chosen sets of social values, both equally irrational, each but a different way of expressing the Romantic *Volksgeist* dogma of Savigny.

The substitution of the model of *Nicomachean Ethics* for the principles of natural law, means that cases are no longer tried on the substance of the issues, but tend to be tried merely on account of form of procedures.

In the crises now erupting, the very existence of our republic depends upon a philosophy of law which subordinates procedures to matters of substance. For example:

1) Does every person in our nation have the right, or not, to society's development of their potentials for reason, their potentials to do good, or not? Thus, if we fail to educate our young properly to this purpose, we violate natural law, and any law or related practice which works to contrary effect is a violation of natural law, for which members of government are accountable to society and the Creator.

2) It is the same with the right to employment, or to access to other essential opportunities to live a meaningful individual life of contributing some good.

3) In general, the sacredness of the individual person's life, is a test of the substance of practice of law. Where do our justices stand on the growing spread of the practice of euthanasia, and this in a way no different from the offenses for which Nazi doctors and others were condemned at Nuremberg?

4) The principle of sovereignty and related rights of other nations, is also a matter of substance of the law.

Ladies and gentlemen of the Congress, there is a cruel spread of grave injustice throughout this nation, injustice being spread by aid of recent policies of government. There is monstrous, even mass-murderous injustice in the world at large, cruelties too often fostered by the policies of our own government. Must we not judge our law by the measure of such effects? Shall we continue to behave as the worst sort of bureaucrat, who, after assisting to perpetrate foul cruelties, defends his actions by stating that he has followed the prescribed procedures?

Shall we judge laws and practices subject to law by their moral effect, and shall we compel procedures to bend into compliance with achieving the needed moral effect? Do our justices understand and uphold the wisdom of the authors of our Declaration of Independence and Constitution on such accounts, or do they reject that wisdom because of some "right" or "left" version of a Romantic theory of statecraft and law?

The response of nominee Robert H. Bork on these matters, a response situated with respect to the kinds of measures the crisis will present to the next President and Congress, is the most essential thing to be considered in weighing the merits of his being confirmed. His earlier decisions, his published views, and so on, are of relative unimportance compared with the governing philosophy of statecraft which might be adduced to reside most deeply within his soul. It is that philosophy which every reflective citizen of this nation should wish to know. Let us examine that in light of the kinds of actions which the imminent crisis tends to place before our Federal Court.