

In a radio interview with "EIR Talks" on April 17, LaRouche again warned of the dangers of the Fowler strategy. There are three things that can't be seen as foregone conclusions for the November election, he said.

First, the Democrats are not assured that they will recapture the House of Representatives. "In that case," LaRouche said, "if the President were to win the election as President, he would face a disaster immediately, even before the swearing-in of the new administration and Congress. Because the Republicans would go out to destroy him, using everything in the world to destroy him. And they probably would succeed." LaRouche explained that the way to guarantee the President's reelection is to go for a clean sweep of Congress, something which is not occurring because of Fowler's strategy.

Second, LaRouche cautioned that the President could be defeated, given that the Fowler strategy could drive the Democrats' minority base into the hands of a third party effort. LaRouche said that while Clinton would win any debate with Dole, this might not prove sufficient to guarantee his victory in November, if, in fact, Fowler succeeds in driving minorities and others to vote for a third-party candidate.

In this context, LaRouche mentioned the emerging misalliance between Ross Perot's Reform Party and the New Alliance Party's Lenora Fulani. "You have Lenora Fulani . . . teaming up with Ross Perot as part of a Rainbow Coalition-type national ticket, as a real third-party ticket, trying to draw away from the Democratic Party, precisely those votes from the core Democratic Party vote, that Clinton would need to win his reelection."

Finally, LaRouche discussed Clinton's problems should he be elected. "Let's suppose the best occurs," LaRouche hypothesized, "that the President wins reelection, and that we carry the House of Representatives, and, perhaps make some inroads into the Senate, in which case the President can actually govern as President. . . . But, suppose he becomes President, and he doesn't have the policy that I'm pushing. Then he would go down in history as one of the great failures of the American Presidency, and the United States itself might not survive. Because the issue that the President has to face, of which he's saying nothing now . . . is that the entire international monetary and financial system is bankrupt. The whole system can blow at almost any time."

What Clinton must do, said LaRouche, is this: "Now, the President of the United States, provided he has political support for this from within the Congress, and from the people, can use the constitutional authority, both of the Constitution itself and that authority he has under it, to put the Federal Reserve into receivership, reorganize the currency system—that is, supplement the present currency with U.S. currency notes, set up national banking, launch the kind of economic recovery program which many in the Senate and House, the Democrats, are pushing toward now, things like the Bingham bill and so forth. And, in that case, then negotiate with foreign powers to create a new monetary system."

Rehnquist's states' rights are based on common law

by Edward Spannaus

Chief Justice William Rehnquist has once again issued a ruling on behalf of a majority of the Supreme Court which carries forward the destruction of our federal Constitution at the hand of "states' rights." Not surprisingly, he had to reach back into doctrines of English common law to justify his treasonous ruling.

A year ago, in *U.S. v. Lopez*, the Supreme Court took a big step toward rolling back federal power, in terms that would make Newt Gingrich and Phil Gramm proud. The implications of that ruling were that a reversion to the court's pre-New Deal jurisprudence—when it routinely struck down all applications of federal economic power—was in the offing. (See "The Rehnquist Court Joins the Conservative Revolution," *EIR*, May 12, 1995.)

The issue in the court's March 27 ruling, in the case *Seminole Tribe of Florida v. Florida*, involved whether the Seminole tribe could sue the state of Florida to enforce the 1988 Indian Gaming Regulatory Act. Apart from the wisdom of the legislation in the first place, the statute explicitly provided that an Indian tribe could sue a state in federal court to enforce provisions of the law.

Rehnquist, writing on behalf of himself and Associate Justices Anthony Kennedy, Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas, ruled that the doctrine of "sovereign immunity" bars a lawsuit against a state unless the state has consented to such a suit—despite the clear intention of Congress to authorize such suits to be brought in federal court.

A 'shocking affront'

Justice John Paul Stevens, in his dissent, called the ruling a "shocking . . . affront to a co-equal branch of our Government," i.e., the Congress, and declared that the majority's ruling will prevent Congress from providing a forum for enforcing federal laws against the states, including actions involving patents, copyrights, bankruptcy, environmental law, "and the regulation of our vast national economy."

Justice David Souter, joined by the two most recent appointees to the court, Justices Ruth Bader Ginsburg and Stephen Breyer, wrote that "the Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right."

Rehnquist's ruling was that the Eleventh Amendment to the United States Constitution denies Congress the power to

authorize lawsuits against a state. Rehnquist conceded that the Eleventh Amendment doesn't actually say this, but that it must be inferred from the "presupposition" that "each State is a sovereign entity in our Federal system," and that it is inherent in the nature of sovereignty that the sovereign is not amenable to being sued without its consent. (Rehnquist reluctantly admitted that enforcement of civil rights under the Fourteenth Amendment still is permitted, since that amendment was passed after the Eleventh Amendment.)

Rehnquist relies upon an 1890 Supreme Court decision, *Hans v. Louisiana*, which incorporated the notion of state sovereignty and the British common-law doctrine of "sovereign immunity" into the Eleventh Amendment. The Eleventh Amendment, ratified in 1795, was written to prevent citizens from suing a state for collection of war debts; in 1820, Chief Justice John Marshall explained that the Eleventh Amendment had the narrow purpose of preventing creditors from suing a state, but that it was not intended "to strip the [national] government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation."

But to turn the Eleventh Amendment into an instrument of rampant states' rights against the federal Constitution, Rehnquist had to recast it against what he calls "the background principle of state sovereign immunity." But this "background principle," as the dissenting opinions show, is based upon English common law—never a part of our nation's constitutional law.

Documentation

Following are excerpts from the dissenting opinions of Justice Stevens and Justice Souter in Seminole Tribe of Florida v. Florida.

Justice Stevens: Except insofar as it has been incorporated into the text of the Eleventh Amendment, the doctrine [of sovereign immunity] is entirely the product of judge-made law. Three features of its English ancestry make it particularly unsuitable for incorporation into the law of this democratic Nation.

First, the assumption that it could be supported by a belief that "the King can do no wrong" has always been absurd; the bloody path trod by English monarchs both before and after they reached the throne demonstrated the fictional character of any such assumption. Even if the fiction had been acceptable in Britain, the recitation in the Declaration of Independence of the wrongs committed by George III made that proposition unacceptable on this side of the Atlantic.

Second, centuries ago the belief that the monarch served by divine right made it appropriate to assume that redress for wrongs committed by the sovereign should be the exclusive province of still higher authority. . . .

Third, in a society where noble birth can justify preferen-

tial treatment, it might have been unseemly to allow a commoner to hale the monarch into court. Justice [James] Wilson explained how foreign such a justification is to this Nation's principles. . . .

In sum, as far as its common-law ancestry is concerned, there is no better reason for the rule of sovereign immunity "than that so it was laid down in the time of Henry IV." That "reason" for the perpetuation of this ancient doctrine certainly cannot justify the majority's expansion of it. . . .

Justice Souter: There is and could be no dispute that the doctrine of sovereign immunity that *Hans* purported to apply had its origins in the "familiar doctrine of the common law," "derived from the laws and practices of our English ancestors." . . . This fact of the doctrine's common-law status in the period covering the Founding and the later adoption of the Eleventh Amendment should have raised a warning flag to the *Hans* Court and it should do the same for the Court today. . . .

One of the characteristics of the Founding generation, was its joinder of an appreciation of its immediate and powerful common-law heritage with caution in settling that inheritance on the political systems of the new Republic. . . . But even in the late colonial period, Americans insisted that "the whole body of the common law . . . was not transplanted, but only so much as was applicable to the colonists in their new relations and conditions. Much of the common law related to matters which were purely local, which existed under the English political organization, or was based upon the triple relation of king, lords and commons, or those peculiar social conditions, habits and customs which have no counterpart in the New World." . . .

Dean Pound has observed that, "[f]or a generation after the Revolution . . . political conditions gave rise to a general distrust of English law. . . . The books are full of illustrations of the hostility toward English law simply because it was English which prevailed at the end of the eighteenth and in the earlier years of the nineteenth century." . . . James Monroe went so far as to write in 1802 that "the application of the principles of the English common law to our constitution" should be considered "good cause for impeachment." . . .

While the States had limited their reception of English common law to principles appropriate to American conditions, the 1787 draft Constitution contained no provision for adopting the common law at all. . . . Instead, the Framers chose to recognize only particular common-law concepts, such as the writ of habeas corpus, and the distinction between law and equity, by specific reference in the constitutional text. This approach reflected widespread agreement that ratification would not itself entail a general reception of the common law of England. See Letter from John Marshall to St. George Tucker, Nov. 27, 1800, ("I do not believe one man can be found" who maintains "that the common law of England has . . . been adopted as the common law of America by the Constitution of the United States").