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EMBARGOED until 2:30 p.m. E.S.T.
October 2, 2012

**JUSTICE JOHN PAUL STEVENS (Ret.)**

**REMARKS**
**CHICAGO BAR ASSOCIATION**
**JOHN PAUL STEVENS AWARDS LUNCHEON**

**The Standard Club**
**Chicago, Illinois**
**October 2, 2012**

Sanford Levinson, a respected professor of constitutional law at the University of Texas, has recently written a book entitled "Framed", in which he concludes that there are sufficient defects in the structure of our government to make it appropriate to convene a constitutional convention. Among the defects in our present fundamental law that he identifies is the failure to make adequate provision for future catastrophes. He points to the danger of an even more successful terrorist attack than the one that occurred on September 11, 2000, natural disasters sufficiently serious to require responses by the federal government, and the possibility of a pandemic causing the wholesale incapacitation of high government officials, rather

than merely the death of the president or the vice-president. I do not share Levinson's opinion that we should re-examine the entire constitution. His writing does persuade me, however, that the predictable consequences of a judge-made rule announced in two cases decided before the 9/11 attack are sufficiently serious and foreseeable to justify correction by a constitutional amendment.

In *New York* v. *United States,* decided in 1992 (505 U.S. 144), and *Printz* v. *United* States, decided in 1997 (521 U,S. 898), over my dissent in both cases, the Court announced that the federal government may not "commandeer" state officials. In the former case the majority invalidated the provision of the Low Level Radioactive Waste Policy Amendments Act of 1985 that required states to take title to certain undisposed radioactive wastes, and in the latter it invalidated the provision in the Brady Act that required county law enforcement officials to make background checks on prospective purchasers of handguns during the period

when the federal government was developing its own enforcement program. In both cases it was perfectly clear that Congress' power to regulate interstate commerce provided an adequate source of federal authority to enact the challenged legislation; the basis for the ruling in both cases was not anything found in constitutional text, but rather a judicially fashioned doctrine in the nature of an affirmative defense protecting the sovereignty of the states. I shall refer to the defense as "the anti-commandeering doctrine."

While I was an active member of the Court, I seldom found time to read law review commentary on our cases, but that is no longer true. After reading professor Levinson's book, I decided to take a look at what the scholars had to say about the new doctrine when it was first announced. Particularly interesting was the article by professors Adler and Kreimer in the 1998 edition of the Supreme Court Review published by the University of Chicago. Referring to the doctrine as

the "New Etiquette of Federalism", they compared it with *National League of Cities* v. *Usery,* an especially important federalism case that had been decided in the first term of my service on the Court. In *Usery* , a case that has since been overruled, the Court had invalidated a federal statute that required States to comply with the Fair Labor Standards Act. Commenting on the new anti-commandeering doctrine, the professors wrote: "Like the federalism jurisprudence set forth a generation ago, in *National League of Cities* v. *Usery,* the new jurisprudence of commandeering purports to define an area of total state (and local) immunity from federal intervention. Neither the magnitude of the federal interest nor the degree of interference with state prerogatives is relevant. Rather, the doctrinal boundaries constitute what Justice Kennedy calls 'the etiquette of federalism,' and federal trespass across those boundaries is per se invalid."

The bulk of the carefully written article is a discussion of the wisdom, or lack thereof, of the new

rule and ends with an interesting prediction. After noting that other scholars had already shown that neither history nor constitutional text supported the new doctrine, their own analysis "emboldened" them "to make the positive prediction that the doctrines will soon be abandoned, as was *National League of Cities* a generation ago. A jurisprudence that consists of nothing more than some arbitrary rules of 'etiquette' ought to be, and we hope soon will be, outgrown."

While I certainly agree that both *New York* and *Printz* should be overruled, the Court's decisions in recent years persuade me that the professors' prediction is unlikely to come to pass. Before foreseeable catastrophes actually occur it would make sense to amend the Constitution to eliminate the unfortunate judge-made rule that never should have been adopted in the first place and can only impede the efficient implementation of federal programs. A rule that prohibits the federal government from requiring state officials to take action to help locate missing

children, to apprehend violent offenders, and to forestall terrorist attacks and the spread of communicable diseases, cannot be wise. As expressly conceded in the Court's opinion in *Printz*, "there is no constitutional text speaking to" the precise question raised by the case. While I think scholarly commentary has already explained why neither the structure of the Constitution, nor the prior jurisprudence of the Court (other than the overruled *Usery* case) support the rule, I shall make two brief comments that may stimulate further consideration of the issue - first, a comment about an often overlooked provision of the Constitution, and second about how the addition of a four word amendment to Article VI would solve the problem.

The final clause in Article V, which deals with procedures for amending the Constitution, though often overlooked, sheds a revelatory light on the importance of the compromise made by the framers to protect the sovereignty of the smaller states. As you

know, one of the great compromises that enabled the Framers to form the new government was the agreement to create a bi-cameral legislature, including a Senate in which every State has Equal Representation. The exceptional importance of that compromise is confirmed by the fact that Article V concludes with a proviso categorically prohibiting any amendment to the constitution that would deprive any State, without its consent, "of its equal Suffrage in the Senate." It is that provision of the Constitution that was most obviously designed to protect the sovereign interests of separate States.

The duty that federal law imposed on the police officer named Printz to conduct a background check on a prospective purchaser of a handgun before the sale could be completed was a duty imposed by Congress in a law passed by the Senate, as well as the House of Representatives. The procedure that was followed was designed by the Framers to protect the sovereignty of the States. The notion that they expected federal

judges to fashion additional rules for the protection of individual state officials is really quite absurd.

The text of Justice Scalia's opinion for the Court in *Printz* identifies a simple way to put an end to the anti-commandeering rule. Responding to the argument that from the beginning the federal government had, in fact, commandeered the services of state officials for several purposes - to nationalize new citizens, to collect taxes, to resolve controversies concerning the seaworthiness of ships, as examples - Justice Scalia pointed out that those examples all involved state judicial officers. Because the text of the Supremacy Clause in Article VI, expressly provides that the "Judges in every State" shall be bound by federal law, he argued that that text authorized the commandeering of judges but not executive or legislative officials because they are not mentioned in that sentence. For several reasons I find that argument unpersuasive, but if we accept the proposition that the express mention of judges, coupled with the absence of any mention of

other state officials in that sentence supports, the Court's holding, it can be reversed by an amendment that merely adds four words to the text of Article VI. As so amended the critical text would read as follows:

"The Constitution, and the Laws of the United States which shall be made in pursuance thereof; and Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges *and other public officals* shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

For all the reasons set forth in my dissenting opinion in *Printz* such an amendment should not be necessary. Nevertheless, rather than taking the risks associated with reliance on the voluntary assistance of local officials like Jay Printz, it would be prudent to adopt the amendment that I have proposed before the next time-bomb explodes.