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EMBARGOED until 2:30 p.m. (E.D.T.)
September 18, 2014

JUSTICE JOHN PAUL STEVENS (Ret.)

15th Annual
Justice John Paul Stevens Awards Luncheon

The Standard Club
Chicago, Illinois
September 18, 2014

Returning to Chicago to attend the luncheon at which fine lawyers are recognized for their outstanding contributions to the administration of justice is always an especially enjoyable occasion. I am happy to be able to extend my congratulations to each of the recipients who has been honored here today. I plan to respond to your warm welcome by making a few remarks about my book proposing six amendments to our Constitution. Specifically, I shall comment on the book review published in the Wall Street Journal in July that was authored by Steven Calabresi, a well-respected member of the faculty of my favorite Law School. Calabresi opposes all six of my proposals, but regards two of them - amending the Supremacy Clause in Article VI to do away with the "anti-commandeering"

rule announced in the *Printz* case in 1997, and prohibiting political gerrymandering - as the most ill-considered. Before commenting on his objections to those two proposals, I shall briefly identify his objections to three of the others.

He states that overturning the Second Amendment and doing away with the death penalty would cause "public outrage". Those of you who have survived Illinois' decision to abolish the death penalty are better judges of the significance of the outrage that it generated than I am, but surely the fact that the losers in a debate may be outraged says nothing about the wisdom of a political decision. And with respect to the Second Amendment, it is important to remember that in the decades preceding the decision in *Heller* the law unambiguously gave legislatures rather than federal judges the final authority in debates about the wisdom or lack thereof of laws regulating the sale or use of firearms.

With respect to doing away with a sovereign immunity doctrine that discriminates between state agencies and their private counterparts, and which invalidated federal statutes enacted with bi-partisan support imposing liability on states for the infringement of patents, copyrights and trademarks, the book review merely states that my proposal "would allow state governments to be sued for money damages for the first time in history." As cases like *Chisholm* v. *Georgia*, decided in 1793, *Osborn* v. *Bank of the United States*, decided in 1824, and *Pennsylvania* v. *Union Gas Co.*, decided in 1989, demonstrate, the statement is inaccurate; more importantly, however, it ignores the manifest injustices that the doctrine preserves and protects.

While the review mentions without comment my proposal to amend the constitution to authorize reasonable limits on political campaign expenditures,

Professor Calabresi does give reasons for disagreeing with the conclusions in my chapters on the anti-commandeering rule and political gerrymandering. With regard to the former, he correctly states that my proposal "would allow Congress to force state officials to enforce federal law even when they are being paid for their time by state governments." But then, ignoring the lessons of history during the years prior to 1997 and the fact that federal laws are enacted by representatives of the States, he predicts: "It isn't hard to imagine what would follow: State officials would end up working for the federal government; they would lose their independence; and the states would pay the resultant costs." But as a matter of fact nothing of the kind occurred during either World War I or World War II, when state officials administered the federal selective service laws. Indeed, the fact that the vast majority of law enforcement officials supported the provision of the Brady Act that imposed a temporary requirement that they perform background checks on

purchasers of firearms while the federal program was being developed belies Professor Calabresi's pessimistic prediction.

Finally, while acknowledging that "Gerrymandering has poisoned our politics by causing incumbents in safe seats to worry more about primary challenges than about general elections", he objects to my proposed cure because it "would strip yet another crucial power from the states." But the "crucial power" at issue is nothing more than the power to draw non-compact districts whose bizarre shapes were designed to preserve or enhance the political power of the party in control of the state government. He faults the book for its failure to answer these hypothetical questions:

> "Should compact districts follow city and county boundary lines? Should they combine urban and suburban voters? Or should they just be drawn arbitrarily? Justice Stevens does not say. Perhaps

that's because drawing district lines raises a non-justiciable political question."

That is quite wrong. Because each of the three questions asks for my preference between different examples of compact districts, and my proposed amendment merely prohibits non-compact districts, the answer to each of the questions is that whatever the hypothetical legislature decides is perfectly o.k. with me.

He also states that "Throughout U. S. history, state governments have always had the power to draw the boundary lines for U. S. congressional districts and state legislative districts, so long as the districts have roughly equal populations [and] are geographically contiguous and compact." But even if states did have such power - just as states now have the power to draw nothing but compact districts - during the years when Justice Frankfurter's rhetoric about "political

thickets" held sway on the Court many state governments refused to redistrict to account for population changes. In 1946, for example, in *Colegrove* v. *Green*, the Court concluded that Illinois Congressional districts with populations that varied from 112,116 citizens to 914,000 citizens could not be challenged on malapportionment grounds because the issue raised a "non-justiciable political question." There is a remarkable similarity between Justice Frankfurter's views about political thickets and Professor Calabresi's criticism of my book.

My proposed constitutional amendment should make it perfectly clear that the Court has the same power to prohibit political gerrymanders that it is already using to prohibit racial gerrymanders.

Thank you for your attention and for your hospitality.