For further information contact:
Public Information Office (202) 479-3211

EMBARGOED until 8:00 p.m. E.S.T.
December 27, 2012

JUSTICE JOHN PAUL STEVENS (Ret.)

Tau Epsilon Rho Law Society
92nd Annual National Convention

Benjamin Nathan Cardozo Award Dinner
Waldorf Astoria Naples Beach Resort
December 27, 2012

At the end of my last Term on the Supreme Court, over my dissent a majority of five Justices held that Chicago's ordinance prohibiting the possession of handguns in the home was unconstitutional. The principal contention advanced by the petitioner was that the right to keep and bear arms protected by the Second Amendment against federal infringement was made applicable to the States by the Privileges or Immunities Clause of the 14th Amendment; his secondary argument was that the right was protected by the Due Process Clause of that Amendment. The former argument asked the Court to overrule the *Slaughter-House* cases, decided in 1873, whereas the latter would require the

majority to reaffirm the doctrine of "substantive due process" - the line of cases that holds that due process protection is not limited to procedural guarantees but also includes substantive protections of important interests in liberty, such as parents' right to have their children educated in a parochial school and a woman's right to have an abortion.

The dilemma that faced the justices, who had just recently breathed new life into the Second Amendment, is illustrated by this colloquy about the *Slaughter-House Cases* between Justice Scalia and petitioner's counsel at the oral argument:

> "[W]hy are you asking us to overrule . . . 140 years of prior law, . . . when you can reach your result under substantive due [process] - I mean, you know, unless you're bucking for a place on some law school faculty. . . . [W]hat you argue is the darling of the professoriate, for sure, but it's also contrary to 140 years

of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it's wrong, I have - even I have acquiesced in it."

It occurred to me as I listened to that colloquy, that if 140 years of precedent required Justice Scalia to reject the petitioner's primary submission, and if he were truly convinced that the doctrine of substantive due process is "wrong", he should vote to uphold the Chicago ordinance. Given the fact that the purpose of the Second Amendment was to protect the States' ability to regulate their own militias, it would have been especially appropriate to render a decision that gave state legislators, rather than federal judges, the final say about the validity of local gun control regulations. As you know, I was wrong about how Justice Scalia would vote in

the case, and, according to the majority, equally wrong about how the case should be decided.

Despite my strong feelings about the issue, however, I do not intend to talk about gun control this evening. Instead, having been reminded by that colloquy of the importance of Supreme Court cases decided 140 years ago, I plan to say a few words about Ulysses S. Grant, the law in Louisiana when the *Slaughterhouse* cases were decided, and the doctrine of sovereign immunity that first became a significant part of American law shortly after that case was decided.

Ulysses S. Grant was a true military hero whose extraordinary accomplishments in battle are well known and universally praised. The fact that he was also a great President is less well recognized. He was first elected in 1868, as the successor to Andrew Johnson, and ended his second term in 1877 when he was succeeded by Rutherford B. Hayes. In one important respect, the policies

of Grant's administration differed dramatically from those of both his predecessor and his successor. During the years after the Civil War he thought it necessary to maintain a military presence in the South in order to protect the new citizens' right to vote. Federal troops were withdrawn as a result of the compromise that resolved the disputed election of 1876.

The 13th Amendment, prohibiting slavery, and the 14th Amendment, granting citizenship to the former slaves and overruling the Dred Scott case, were ratified before Grant became President, but the 15th Amendment guaranteeing the new citizens the right to vote, was proposed and ratified while Grant was in office. He supported civil rights legislation that was designed to put an end to the atrocities committed by white supremacists in the South; one of those statutes, known as the Ku Klux Klan Act, is now codified as section 1983 of Title 42 of the U. S. Code, and is still the principal

federal statute authorizing litigation raising issues of constitutional law. Perhaps of greatest importance, he used his power as Commander-in-Chief of the Army to support federal efforts to achieve the goals that those Amendments and the Ku Klux Klan Act were adopted to achieve.

The presence of armed forces at strategic locations in the South made it possible for Republicans, including the new class of African-American citizens, to influence the outcome of enough elections to obtain control of some state governments. Contrary to the demeaning characterization of the white Republicans as unprincipled "carpetbaggers", and notwithstanding widespread unproven allegations of political corruption, the accomplishments of these Republican legislatures were much more significant and enlightened than most people realize. Three laws enacted in Louisiana while Grant was President illustrate my point. All three gave

rise to significant litigation in the United States Supreme Court.

Best known of the three was the 1869 law regulating the location and manner of conducting the slaughtering of animals for the New Orleans market. In earlier years the unregulated slaughterhouses located on the banks of the Mississippi River upstream from the City had been a principal cause of pollution that made New Orleans the most unhealthy large city in the country - with a death rate more than eight times higher than any comparable American city. While there has been no significant debate about the public health benefits achieved by the legislation - similar controls were imposed in other large cities in both Europe and America - the litigation challenging the law produced Supreme Court opinions construing the Civil War Amendments that were the subject of debate in the gun control case that I just mentioned.

The majority opinion in the *Slaughter-House Cases*, written by Justice Miller - who happened to have been a practicing physician for ten years before he took up the study of the law - correctly upheld the slaughterhouse legislation. In doing so, however, instead of simply relying on the State's broad police power to protect the public health, Miller endorsed an unfortunately narrow construction of the "Privileges or Immunities" Clause of the 14th Amendment. Thus the lawyer for the losing litigants, John Campbell, a former justice of the U. S. Supreme Court who had been in the majority in the infamous Dred Scott case and had resigned to join the Confederacy, obtained a strategic victory for the racist Democrats even though the Republican-sponsored legislation was upheld.

The second and third Louisiana laws that I shall mention were provisions of the State Constitution adopted in 1868. Article 13 of that

constitution provided that "[a]ll persons shall enjoy equal privileges upon any conveyance of a public character." Under that provision blacks could not be required to ride in the back of a bus. Legislation implementing that Article enacted in February of 1869 provided victims of discrimination on common carriers with a cause of action for damages. Josephine DeCuir was such a victim. As a passenger on a steamboat on the Mississippi River she had been excluded from a portion of the ship reserved for whites. The state trial court awarded her damages of $1,000 and the State Supreme Court had affirmed, rejecting an argument that the statute did not apply to vessels engaged in interstate commerce. When the case was reviewed in the United States Supreme Court, all nine justices agreed that the statute as construed by the Louisiana courts imposed an impermissible burden on interstate

commerce, thus handing another strategic victory to the Klan-dominated Democratic party.

I first became aware of that unfortunate decision in 1947 when I was working as a law clerk to Justice Rutledge. He wrote the opinion in the *Bob-Lo Excursion* case, 333 U. S. 28 (1948), in which the Court, by a vote of seven to two, upheld the application of a Michigan civil rights statute to a vessel traveling back and forth between Detroit and the Bob-Lo Island just across the Canadian Border. Like Louisiana in 1869, Michigan prohibited the carrier from enforcing a white's only policy; unlike the earlier Supreme Court, however, the majority in 1948 upheld an award of damages to an African-American high school student who had been prevented from joining her classmates on a visit to the Bob-Lo Island. In my discussion of the case in my book, Five Chiefs, I explain that the refusal of Chief Justice Fred Vinson and Justice Robert Jackson either to overrule or to

distinguish the clearly erroneous earlier Louisiana case adversely affected my appraisal of their work.

The adverse impact on the cause of equal treatment for all citizens resulting from the Supreme Court's decision in *Hall* v. *DeCuir* in 1878 was far less significant than the dramatic changes in Louisiana's State Constitution that became effective in 1879, shortly after federal troops were withdrawn. Article 13 of the 1868 Constitution requiring equal treatment of passengers on public conveyances was deleted; in the new constitution it was replaced by a provision stating only that "[t]he enumeration of rights shall not be construed to deny or impair other rights of the people not herein expressed."

The newer constitution also dramatically changed provisions relating to public education and the payment of the State's debts. Article 135 of the 1868 document expressly authorized free

public schools open to both blacks and whites. Thus, while the Republicans were in control of the State, they took essentially the same action that Thurgood Marshall, almost a century later, persuaded the Supreme Court was actually mandated by the 14th Amendment to the Constitution. Louisiana's 1879 Constitution replaced the authorization of an integrated public school system with provisions that required segregation in various public facilities, including schools, swimming pools and restrooms.

The later constitution also led to dramatic changes in Louisiana's ability to modify or repudiate its financial obligations. The Eleventh Amendment to the Federal Constitution provides that federal courts do not have jurisdiction over cases brought against a State by citizens of another State. Nevertheless, in 1874, while the Republican Constitution was in effect, a Delaware citizen successfully sued Louisiana state

officials, compelling them to honor commitments made to bondholders on behalf of the state. Relying on opinions written by John Marshall, a unanimous Court decided that if a state officer should "plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void."

That well-settled rule was changed dramatically in the *Jumel* case, interpreting Louisiana's 1879 Constitution. In that Constitution, the State had expressly repudiated its obligation to make future payments of principal and interest on bonds issued by the previous Republican administration, and diverted to other purposes tax revenues that had been set aside for payment to those bondholders. The *Jumel* case, was an action by several bondholders from other states who sought to compel the Louisiana

state auditor to make payment on their bonds from those tax proceeds. The defendants were represented by the same John Campbell who had won a strategic victory for the Democrats in the *Slaughter-House Cases*. He was even more successful in *Jumel* because, as dissenting Justices Field and Harlan, demonstrated, he persuaded the majority to hold "in effect, if not in terms" that the case could not proceed because it was actually seeking relief from the State itself, and was therefore barred by the 11th Amendment. Both of the dissents explained at length why the majority's new approach to the 11th Amendment was inconsistent with prior rulings. The debate in those three opinions persuades me that the Justices were concerned about their ability to enforce a judgment against the State after the federal troops had been withdrawn from the State. My conclusion that the decision really had nothing to do with the text of the Eleventh

Amendment is buttressed by the fact that in the final Louisiana case that I shall mention tonight, *Hans v. Louisiana*, the Court reached the same result in a case brought by a Louisiana citizen. It is that case that is the centerpiece of the misguided sovereign immunity jurisprudence that was crafted by Chief Justice Rehnquist during his tenure, and unfortunately expanded by five misguided Members of today's Court.

Today, under that jurisprudence - notwithstanding several attempts to modify the law by unanimous Congresses - state universities and other state agencies enjoy an immunity that not only enables them to refuse to pay their creditors, but also protects them from paying damages for patent infringement, for copyright infringement, for trademark infringement, and for violating a host of other federal statutes protecting their employees from discriminatory practices. I am persuaded that those strange

judge-made rules would never have become a part of our law if the Union forces had not been withdrawn from the South after Grant's tenure in office ended. Moreover, if he were alive today, I feel sure that he would have led a campaign to ship the whole doctrine of sovereign immunity back to England where, long ago, the Queen's subjects once believed that the sovereign can do no wrong.

Thank you for your patience.