

HB

158

(File 2)

465-3922

Dear S. Taylor —

Attached is a mark up
position paper

I re the collateral benefits

part of the Tort claims

Bill. Call if any

questions! Thanks

for all your help!

— M

LAW OFFICES

Michael J. Schneider, P.C.

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ANCHORAGE, ALASKA 99501

FACSIMILE COVER SHEET

TO: Senator Taylor
FIRM: _____
DATE: 5/4/95
FAX: 465-3922 PHONE: _____
RE: _____

FROM: Mike Schneider

CLIENT NAME: _____ CLIENT NO. _____

COMMENTS: _____

TOTAL NO. OF PAGES (INCLUDING COVER SHEET): 4

Contact Karolynn at 277-9306 if all pages are not received.

forms\fax.sht

13
Section 24

COLLATERAL BENEFITS

History and Current Law Regarding the Collateral Source Rule

The "Collateral Source Rule" prevents introducing evidence about the injured plaintiff's right to workers' compensation benefits or other insurance proceeds paid for by the injured party before the injury. The rule was based on the principal that a wrongdoer is not entitled to have their liability reduced merely because the injured victim was fortunate enough to have received compensation for their injuries or expenses from a "collateral source" such as workers' compensation or private insurance. It was further assumed that the jury, if it were to find out about such receipts, would be improperly influenced in evaluating both liability and damages. The collateral source rule in this form was applied in Alaska courts since before statehood, but was formally adopted by the Alaska Supreme Court thirty years ago in Ridgeway v. North Star Terminal and Stevedoring Co., 378 P.2d 647 (Alaska 1963). The 1976 legislature changed the collateral source rule as applied in medical malpractice cases. See AS 09.55.548. Ten years later, in 1986, the legislature adopted AS 09.17.070 regarding collateral benefits. That bill made it virtually impossible for an injured victim to ever "collect twice" by allowing the defendant to present evidence of collateral benefits received by the plaintiff that the plaintiff did not have to repay because of a subrogation clause. The plaintiff's award would be reduced if these collateral source benefits exceeded plaintiff's attorney's fees and costs in bringing the action. This statute was applicable to all cases other than malpractice cases and is the current law.

How the Current Law Works

No cases have been found where a plaintiff's award has been reduced under current law because plaintiffs virtually never receive a "double recovery." They almost always must repay their insurance carriers because of "subrogation clauses" in their insurance contracts. The litigation process is almost never a "break even" experience for injured victims. In a rare instance where a plaintiff obtains a double recovery, the current law would make such a recovery impossible by allowing the court to reduce the damage award.

The Proposed Law: HB 158, Section 13

This legislation interferes with the right to contract (most particularly between insurance consumers and insurance companies) by eliminating subrogation rights.¹ It places upon an injured victim who has exhibited the social responsibility and forethought to acquire insurance against catastrophic loss the

¹ This is the intent of the bill. However, with medical and disability insurance provided as an employee benefit (most coverage is provided in this fashion) cannot be effected by state law. Injured Alaskans are therefore certain to have their claims "double dipped".

burden of funding the litigation, while at the same time depriving the plaintiff and plaintiff's insurer of damages actually suffered as a result of the injury. Juries will be prejudiced and confused by this information. The court system will pay the price of prolonging virtually every trial because of this bill.

Hypothetical Case

John Reckless owns a semi tractor and operates it as the owner/operator. John has a drinking problem. John gets into his semi truck, gets drunk, and crashes into a vehicle operated by Joe Plaintiff. Joe Plaintiff is seriously injured and permanently disabled. Joe loses his job, loses his house because of his inability to make house payments, and can no longer work at his occupation. Joe has, however, had the foresight to acquire disability and medical insurance. Joe's medical bills are \$150,000.00, and he is receiving a disability income check as he retrains for future employment.

He and his attorney will have to fight over the amount of probable future benefits from both the medical policy and the disability policy. See Subsection (a). The jury will hear that Joe has received a good deal of money and may thus be confused about whether or not he is entitled to more and the extent and nature of his injuries. Unfairly, the jury won't hear about the extent of Reckless' insurance coverage.

Joe's insurance companies aren't very happy either. While they assumed a certain risk in insuring Joe, they have now parted with \$150,000.00 in medical bills and thousands of dollars of disability payments. They have no subrogation claim against Joe's recovery under subsection (d) of this bill.

Because the collateral benefits are no longer recoverable, the potential benefit to Joe and his attorney are dramatically reduced. In cases where liability is difficult, or other aspects of the case make it problematic, Joe may be without recourse against this wrongdoer. The wrongdoer and the wrongdoer's insurance company have received the benefit of Joe's forethought and expense in procuring insurance while the public pays for a longer, more confusing, more expensive trial.

Conclusion

The current law on collateral benefits is much more restrictive than rules in other states and completely eliminates the possibility of any "double recovery" by the plaintiff. Further invasions of victims' rights benefit only wrongdoers and their insurance companies. The bill is bad public policy. It injures innocent insurance concerns just as it harms plaintiffs.

c:\docs\secl4.pos

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Kneeland Taylor

James J. Hanlon

May 4, 1995

Senator Robin Taylor

By fax: 465-3922

Dear Senator Taylor:

I just reviewed the most recent tort "reform" bill, i.e. CS FOR HOUSE BILL NO. 158 (FIN). I have been following it, and I remain deeply concerned.

I am a registered Republican. I ran for the House in 1980 and now practice law. About 1/3 of my practice is plaintiffs' work, while the rest is litigation oriented.

I am sickened to see that the tort "reform" bill still includes provisions apportioning fault to non-parties. [Sections 11 and 12]. I believe these sections will cause plaintiffs to drag more people into court so that defense counsel cannot point to empty chairs.

It is true that if Sections 11 and 12 remain in the tort "reform" bill, life will be more difficult for plaintiffs' lawyers. That is the goal of the business interests that support it. But Sections 11 & 12 will make life more difficult for Alaskans such as doctors, engineers, and other working people.

Let me give you an example of an accident I witnessed. A reckless driver in a pick up truck crossed the center line of the Seward Highway and crashed head-on into a van driven by a man, his wife, and two young boys. The woman died instantly and the two young boys survived. The vehicle was opened with the "jaws of death", and the man extracted, still alive. The man was kept alive for several hours through the heroic efforts of the rescue workers, passing motorists, including a doctor "good Samaritan", and various doctors at Humana. The man eventually died at Humana Hospital, with the immediate cause being (I believe) accumulated blood within his chest cavity. A risky procedure involving punching a hole in his chest at the accident site might have saved his life, but was not attempted.

The driver of the pick-up truck walked away uninjured. I saw that. I assume that he had liability insurance, and that a claim was eventually made by the two orphaned boys.

Under present law, the auto insurance lawyer representing the pick-up driver will need to sue the doctors, and rescue workers and

bring them into the case if he/she is to blame the doctors and rescue workers for "malpractice". The auto insurance lawyer will not do so, however, since the claim against the doctors and rescue workers is frivolous.

If Sections 11 and 12 are enacted, the auto insurance lawyer will not need to bring the doctors and rescue workers into the case in order to blame them. The auto insurance lawyer can blame whoever he/she wishes without them being there.

That is good for auto insurance lawyers and auto insurance companies. But it is bad for doctors and ordinary Alaskans. It is bad because plaintiffs will have no choice but to sue doctors and other relatively innocent persons every time a defense lawyer indicates in an interrogatory response that the defendant is blaming someone else for an accident. The plaintiff will have no choice because the plaintiff will need the doctor (or other innocent) in court to explain to the jury that the auto insurance lawyer is wrong.

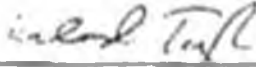
I was at the accident scene described above, and I heard the cries of the two orphaned boys. It is very distressing to me that a majority of our Legislature (not you, thank God) feels that the system is too harsh to the driver of the pickup who orphaned the two boys. If I had been elected to the Legislature, I would support a variety of measures to make the system compel greater responsibility (and/or punishment) for people who kill on our highways.

But I accept the political reality, which is that a majority in the Legislature wants to be more lenient to those who negligently kill and maim. I accept it because I understand the rationale; namely that there is a widespread belief that there is much frivolous litigation.

But what I do not accept is the idea that in the name of tort "reform" the Legislature is about to stimulate the filing of frivolous claims. And that is what sections 11 and 12 will do.

In conclusion, I strongly urge you to seek amendment of the bill that will remove the provisions of Sections 11 and 12 which allow juries to apportion fault to non-parties. If not amended, the Legislature will have created procedural nightmares in numerous cases, which will stimulate litigation, insurance costs, etc.

Finally, I want to thank you in advance for your support for sensible legislation in this area. I also want to thank you for holding hearings which I have been told will be fair.


Kneeland Taylor

**AKPIRG****ALASKA PUBLIC INTEREST RESEARCH GROUP**

Post Office Box 101093 / Anchorage, Alaska 99510-1093
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To: State Senator Robin Taylor
From: Stephen Conn, Executive Director
Subject: Tort bill SB 158
May 3, 1995

AKPIRG supports your decision to seek additional testimony and review of SB 158 during the interim and not to rush to judgment. The public has been subjected to a debate by anecdote which in no way deals with the implications of destroying the privatized policing of our market place without consideration of the alternatives: no policing or socialization of the process. It takes courage to stand firm against the pressures to destroy the system without creating an alternative to the tort system.

In previous testimony before House and Senate committees, I have noted that proponents of tort reform have not made their case either for previous reforms or the new round of proposed changes. I suggested that the task be delegated to the Alaska Judicial Council, an academic think tank or to a legislative task force.

In what is the first analysis of a public policy issue ever performed, this month's issue of Consumer Reports deals with lawsuit reform. I hope you will share this unbiased report with your colleagues. Many Alaskans look to Consumer Reports as a valuable guide to the market place.

NewsWatch

Starting this month, we will be reporting in this space on the many new initiatives—in the courts, in the states, and in Congress—that may have major impacts on the American consumer. We begin with tort

reform, an emotionally charged issue that, as the Wall Street Journal recently observed, has degenerated into a "duel of...deserving polls, studies and 'horror stories' that aren't always what they seem."

Is lawsuit reform good for consumers?

In February 1992, 79-year-old Stella Liebeck of Albuquerque spilled scalding coffee in her lap after leaving the take-out window at McDonald's. She sued the fast-food chain, and a jury awarded her \$2.7 million in punitive damages.

The Liebeck case has been cited again and again in the current legislative battle over tort reform. ("Tort" is a legal term covering claims for personal injury, medical malpractice, and defective products.) As part of the Contract With America, Republican lawmakers have advanced a series of bills that would cap punitive damages, discourage "frivolous" lawsuits, and protect drug companies from suits involving approved drugs.

At first glance these seem like laudable goals. But, as a closer look at the Liebeck case makes clear, the issue is more complicated.

What tort-reform advocates don't point out is that Liebeck was hospitalized for eight days with third-degree burns over 6 percent of her body. They don't reveal that at the time Liebeck was burned, McDonald's already faced more than 700 claims from people also scalded by coffee there. Nor do they mention that McDonald's served its coffee at 180° to 190° F, considerably hotter than other fast-food restaurants.

Liebeck tried to settle her claim for \$20,000, but McDonald's refused. After the initial multimillion-dollar jury award, the trial court reduced the punitive award to \$480,000. Liebeck ended up accepting a settlement for an undisclosed sum.

As of this writing, Congress is considering several legislative proposals to change the American civil justice system. In the area of product liability, many of the proposed changes under consideration would up the scales of justice against consumers. Here are some of those proposals:

□ **Punitive damage caps.** A key provision of a tort-reform bill that passed the House of Representatives in March would cap punitive damages at \$250,000, or three times the amount awarded the plaintiff for economic injury, whichever is greater. (Economic injury includes lost wages and medical expenses.)

For all the fuss about punitive damage awards, such awards are very rare. Nationwide, punitive damages were

awarded in product-liability cases only 355 times during the 25-year period from 1965 to 1990—or an average of 14 a year. That's even though consumer products, not including automobiles, are responsible for an estimated 29,000 deaths and 30 million injuries each year. Nor are product-liability cases "clogging the courts," as some allege. Tort filings represent only 9 percent of the courts' civil cases, and only 4 percent of that number are product-liability cases.

Punitive damages are intended to punish egregious corporate wrongdoing and to deter further consumer injuries. Indeed, there is evidence that punitive damages do make products safer. In nearly 80 percent of product-liability cases that resulted in punitive damages, the manufacturers subsequently took safety measures to prevent additional lawsuits. In one case, for example, a company that continued to sell a step ladder with braces it knew to be inadequate redesigned the ladder only after losing a product-liability suit and incurring punitive damages. The cap on punitive damages would, in effect, allow manufacturers simply to budget for future fines as a cost of doing business, significantly reducing the law's previous incentives for them to make products safer.

□ **Pain-and-suffering caps.** A related provision in the bill that passed the House would cap pain-and-suffering awards in lawsuits involving doctors, hospitals, medical devices, and drugs at \$250,000—an amount that would vastly undercompensate consumers injured by medical negligence or unreasonably dangerous drugs.

□ **"Loser pays" provisions.** In the name of discouraging frivolous lawsuits, Republican lawmakers initially proposed a "loser pays" system that would have required the losing party to pay the winner's legal fees. That provision was later modified to what could be called an "even if you win, you lose" provision. The modified version that passed the House

of Representatives stipulates, for example, that if an injured consumer chooses to go to trial rather than accept a settlement offer, he or she could be forced to pay the defendant's attorney's fees and costs if the jury ultimately awards a sum less than the settlement offer.

Obviously, many injured consumers would not be willing to accept the financial risk of going to trial under such a rule. Only the very poor, who would have nothing to lose, and the very rich, who could afford to lose, would be likely to press their cases. The huge majority of Americans would, in effect, be gambling their life savings if they chose to pursue a case after being offered a low-ball settlement.

□ **The FDA defense.** Under proposed legislation, manufacturers of defective or unreasonably dangerous drugs and medical devices would be shielded from punitive damages if their products had been approved by the U.S. Food and Drug Administration. Though the FDA has been vigilant in protecting the American consumer's interests in recent years, the data it reviews before a drug or device is marketed don't always show every problem. Some approved drugs and devices ultimately have proved dangerous, such as the *Dalkon Shield* intrauterine device and *Versed*, a sedative.

The irony, of course, is that the very political forces that want drug and

medical-device makers off the hook once their products receive FDA approval have also been seeking to make it more difficult for the agency to police the marketplace. The likely result if this legislation becomes law would be a double blow for American consumers: weaker oversight by the FDA and little legal recourse if a drug or medical device harms them.

Though the tort-reform debate appears to be about frivolous lawsuits, what it's really about is corporate responsibility. In the end, the most important question will be who—if anyone—can be held accountable when American consumers are killed, injured, or debilitated through no fault of their own.



A closer look at the now-famous case of the woman who sued McDonald's over scalding coffee shows the issue of tort reform is not what some lawmakers would have you believe.



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May 4, 1995

To: Senators

From: Richard J. Gregory
President of: Sourdough Express, Inc.
Borealis Moving & Storage, Inc.
Greatland Leasing, Inc.
Sourdough Properties, Inc.

Re: HB 158 Tort (Liability) Reform

Please support HB 158. This bill would reduce the costs associated with the civil justice system, match losses with compensation, create equitable distribution of the cost and risk of injury and much more necessary areas of reform.

Sincerely,

Richard J. Gregory

Alaska Transportation Since 1898

• General Commodities

• Bulk Commodities

• Household Goods

• Electronics

May 5, 1995

Senator Robin Taylor, Chairman
Senate Judiciary Committee
State Capitol
Juneau, AK 99801-1182

HB 158

I am opposed to HB 158 especially punitive damages, noneconomic damages, and period payments.

A noneconomic damage cap of \$300,000 would not deter Ford, Exxon, or McDonald's to make changes. The few corporations that are responsible for wrongdoing or personal injury need an incentive to keep the products they make and the services they offer safe.

Punitive damages may not be awarded unless the judge rules there is clear and convincing evidence the wrongdoer has acted outrageously.

- Judges rarely rule for punitive damages. In Alaska, punitive damages have been awarded less than once each year since statehood. (Attorney Tim Dooley, Anchorage—279-7327.)
- Alaska personal injury verdicts currently average 8.1% below national verdict values (Personal Injury Verdict Survey, Alaska Edition 1991)
- The jury listens to all the facts then decides the penalty. The jury consists of 12 Alaskans who make a fair and impartial decision that will deter the wrongdoer from outrageous acts in the future.
- A \$300,000 punitive damage cap will not deter the few companies who are wrong doers to maintain safety in the goods they produce and services they offer.

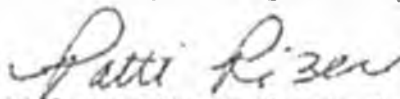
Periodic Payments benefit the wrongdoer only.

- When a victim has taken the time, money, and physical and mental effort to take a wrongdoer to court, when the case is over, it should be over. Prolonging a relationship with the wrongdoer of the tragedy is unfair to the victim.
- Victims usually spend a great deal of money and time during the court process. They often need to pay large debts when the case is over. Periodic payments may hurt the victim even more financially.

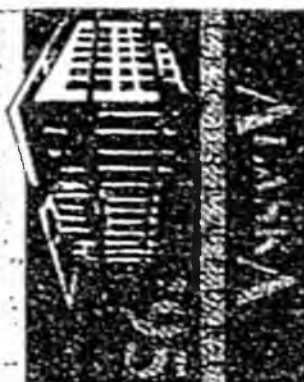
I have been a victim. My son died while skiing at Seibu Corporation's Alyeska Resort December 8, 1991. The ski resort had no written missing person procedures. A ski liability bill, whose major sponsor was Seibu Corporation, was introduced in 1992 and passed in 1994. This bill mandates written missing person procedures in the Operating Plans of all Alaska ski resorts. However, Seibu's 1994-95 Operating Plans DO NOT contain these procedures and other requirements of the new law. This is the situation where a \$300,000 penalty will not promote safety.

Most companies in Alaska produce safe goods and services. But the few who are guilty of outrageous acts need to be punished. Why is the legislature trying to protect these wrongdoers?

Please vote no on HB 158.



Patti Rizer • 5530 Rabbit Creek Road • Anchorage, AK 99516
345-1743 (phone) • 345-5212 (fax)



Liability limits bill hits wall

Senator vows to hold
hearings on reform

By RALPH THOMAS
Daily News reporter

JUNEAU — A bill to revamp Alaska's civil liability laws probably won't go any further this year after Republican Sen. Rob. in Taylor shared it.

The Wrangell lawyer is among the most vocal critics of the measure, which would greatly limit people's ability to sue negligent doctors and builders. After the bill passed the House last week, Republican leaders had indicated they might try to steer it around its most obvious destination — the Senate Judiciary Committee, chaired by Taylor. As chairman, Taylor alone could sit on the bill.

Earlier this week, however, Senate President Drue Pearce sent the bill to Taylor's committee. Taylor said it was referred to him only after he agreed to hold a series of hearings before the legislature reconvenes next year. Though he's making no promises, Taylor said he likely will let the measure

Please see Page B-2, TONT

*Same thing in House
Judiciary + House Finance.*

Liability bill hits snag in Taylor's committee; senator promises hearings

damage claims.



Taylor

that they lean up their act." He is pushing the liability reform — or arm — legislation off of a broad coalition of professionals ranging from doctors and architects to engineers and lawyers. Trial lawyers are leading the effort to

kill the bill.

Porter and his supporters argue the state's existing liability laws are unfair and leave doctors and businesses under the constant threat of expensive and often frivolous lawsuits. Such suits, they contend, clog the courts and help drive up the cost of liability insurance.

During Wednesday's hearing, Loper said plaintiffs are frequently over-compensated by juries. When Taylor asked for statistics showing that, she said she would have to get back to him.

Taylor and other tort reform foes say Porter's bill would tilt the justice system in favor of negligent

professionals, at the expense of their victims.

Under Porter's bill, contractors who construct defective buildings would be shielded from damage claims after eight years. Likewise, doctors who cause injuries or misdiagnose diseases couldn't be sued if the error goes undiscovered for eight years.

People could make a claim beyond the eight years only if they could prove there was gross negligence or fraud, or that the error had been covered up.

Current law gives a victim 15 years to file a lawsuit in construction cases, but there are no time limits for other types of cases.

The time-limit provisions in Porter's bill do not apply to defective products.

Others provisions of the bill would:

- In most cases, limit to \$300,000 the amount a jury can award in "non-economic damages" to compensate for pain and suffering.

- Limit punitive damages to \$300,000, or three times what was awarded in economic damages, whichever is greater. Half of any such awards would have to be given to the state and could only be collected if the plaintiff proves there was "outrageous conduct, including acts done with malice or bad motives."

Taylor said he would try

to hold more hearings before the legislature adjourns this month. He said he also plans to hold several hearings around the state during the summer and fall.

Taylor refused to say whether he would let the bill out of his committee, but he pointed out that the other 11 Republicans in the Senate majority could pull the bill away from him at any time.

Even if the bill clears the Senate next year, it would still have to get past Democratic Gov. Tony Knowles. The governor's chief lobbyist said last week the administration "firmly opposed" the measure.

TORT: Liability limits

• continued from Page B-1

out of his committee next year.

Rep. Brian Porter, House Bill 158's chief sponsor, said he would rather have seen it go to some other committee. "But you do what you have to do," said Porter, R-Anchorage.

Taylor held an initial hearing Wednesday to review the bill. For more than two hours, Taylor grilled Porter aide Daniela Loper on nearly every one of the measure's provisions. Taylor, who said he has fought numerous medical malpractice cases, seemed particularly agitated about sections protecting doctors and hospitals

from damage claims.

Taylor said afterward that such claims have been "the only thing that ever got the attention of the medical community."

Taylor said the community should clean up its act.

Porter is pushing civil liability reform —

on behalf of a coalition of professionals, including doctors, engineers, contractors. Tri- are leading the

May 5, 1995

To Robin Taylor

Fr. Patti Rizer

FYI.

There seem to be no statistics about these "large, common punitive damages" in Alaska. The research of Jim Dooley in Alaska shows about 1 punitive damage award a year (these are the ones that did not get overturned). Jim also said only 3 are more than \$1 million.

Jim is an attorney in Anchorage, and he attends the ^{HBI 58} hearings. He was on hand to hear you "grill" Daniels Japer. Are some people really dumb, or are they just ignorant? Obviously they have never been a victim.

If there is anything I can do to help squash this lie, please let me know.

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465 3922

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May 5, 1995

VIA FAX # 465-3922

Senator Robin Taylor, Chairman
Senate Judiciary
State Capitol
Juneau, AK 99801-1182

Re: Comments on HB 158, Sections 17 & 18

Dear Senator Taylor:

It is my understanding that you had some concerns or questions regarding sections 17 and 18 of HB 158. Although much of the grossly offensive language was deleted by amendment, problems still remain.

First, section 17 effectively amends ARE 702 (a) by establishing limited and specific foundational requirements for expert witnesses in the area of medical malpractice. Since the trial court would be precluded from allowing an otherwise well qualified expert to testify under this provision, the rule of evidence (in these limited cases) has been usurped. I don't believe that this particular section (as amended) passed by the requisite two-thirds majority so it is probably void ab initio.

Even assuming that the section as amended does not change or usurp ARE 702 (a), it is still somewhat problematic.

First, it eliminates certain health care practitioners from testifying in cases where board certification is unnecessary. That is, many well qualified medical doctors are not board certified in any particular area. Under this provision, a General Practitioner who routinely sets broken bones could not testify against an Orthopedic Surgeon no matter how bad he or she bungled a routine procedure. Taken to its logical extreme, an argument could be made under this section to preclude a Neurologist from testifying against an Orthopedic Surgeon even though the issue in question dealt with neurological damage caused by an orthopedic procedure. While the neurologist could testify as to the neurological damage, he or she could not testify as to the standard of care regardless of the degree of deviation.

Senator Robin Taylor
May 5, 1995
Page 2

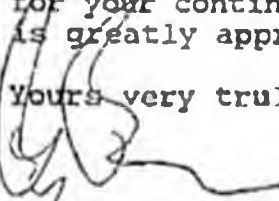
What the drafters are trying to do is to force a match-up of Orthopedists to Orthopedists and Gynecologists to Gynecologists. This is an effective way to significantly limit the pool of available experts due to inter-disciplinary loyalty.

I have always been concerned with section 18, but much of the language was gutted from the originally proposed statute by amendment. Nonetheless, I remain skeptical of this new definition of "professional negligence". First, there is no reason to redefine "professional negligence" for health care providers. Second, it limits professional negligence to health care providers who are rendering "professional services". This could effectively eliminate those health care providers who are used and paid as consultants such as on-call specialists or other persons who are not directly rendering the health care.

Regarding "professional services" I remain skeptical as to the purpose for the inclusion of this definition. Under the original section, it was included in language immunizing doctors (or other health care providers) if they operated outside the scope of their licensing requirements. Fortunately, it was so blatantly offensive that it was amended out by stipulation. There is no purpose to leave this definition in the section as amended other than to further underscore the legislative intent to overrule Jackson v. Powers under section 19.

I hope that this answers any questions which you might have regarding these two sections. I would be more than happy to address other problematic sections under this bill and will make myself available at your convenience. In the meantime, thank you for your continued fight against such bad public policy. Your help is greatly appreciated.

Yours very truly,



Ray R. Brown

RRB:eh
antl/taylor505.12r

LAW OFFICES OF
FRIEDMAN, RUBIN & WHITE

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May 9, 1995

By FAX to: 465-3922

RE: Tort Reform

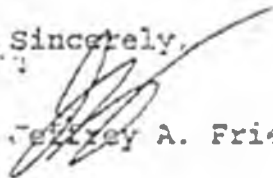
Dear Senator Taylor:

For every frivolous lawsuit filed by a greedy plaintiff, there is at least one frivolous defense to a meritorious lawsuit. Accordingly, I would like to suggest the following amendment to the current tort reform bill under consideration:

1. If a defendant is found to have raised frivolous defenses to a lawsuit, the defendant shall pay an amount equal to its defense costs, one-half of which shall be paid to the plaintiff, and one-half of which shall be paid to the state.

2. There shall be a rebuttable presumption that a defense was frivolous if the plaintiff prevails in the lawsuit.

Sincerely,


Jeffrey A. Friedman

JAF:mg

P.O. Box 230029
Anchorage, Alaska 99523
(907) 346-3611 or 346-2474
May 8, 1995

Post-It™ Fax Note 7671		Date 5/8/95	# of pages 2
To <i>Senator Robin Taylor</i>	From <i>17/Janine Loden</i>		
Co/Dept.	Co.		
Phone #	Phone # 346 3611 r		
Fax # 465 3922	Fax # 346 2474		

Senator Robin Taylor
Chairman of the Senate Judiciary Committee
State House
Juneau, Alaska FAX 465-3922

Dear Senator:

RE: House Bill 158

I discovered that the Russians really don't have a word for "insurance." Thus, they use a Russian word which translates into the English word "fear." The backers of HB 158 are fear-mongering once again with half-truths and mistruths to the public.

INSURANCE COMPANY PROPAGANDA:

- *The high cost of malpractice insurance is linked to the high volume of medical malpractice suits.*

FACTS:

- *Less than one dozen jury verdicts have been won by plaintiffs in medical malpractice suits since Statehood!*
- *Less than ten medical malpractice cases are tried each year in Alaska.*
(Court System)
- *The Alaska Medical Association refers 30 or less cases to medical malpractice panels each year.* (Alaska Medical Association)

Besides doctors, the insurance industry is holding other professionals, contractors, and businesses hostage with high rates that are warranted mainly by the industry's greed, rather than the true risks. What rip-off artists! The real culprits in rate escalation are the insurance companies, not catastrophically injured people who are trying to collect their just due.

Senator Robin Taylor

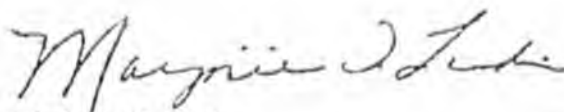
May 8, 1995

Page - 2 -

HB 158 does not address the avarice of the insurance industry. It chooses to pick on the little guys instead of making insurance companies accountable for their high profits, fancy offices, executive salaries, and perks.

PLEASE VOTE AGAINST THIS "INSURANCE COMPANY BABY", HOUSE BILL 158!

Yours truly,

A handwritten signature in cursive script, appearing to read "Marjorie T. Linder".

Marjorie T. Linder

Alaska Telecom, Inc.

P.O. Box 110541
Anchorage, Alaska 99511
(907) 344-1223
(907) 344-1612 (Fax)

Charge Code:

Facsimile Cover Sheet

Date: May 4, 1995

Pages Following: 0

To: Senator Robin Taylor

Fax Number: 465-3922

From: Lloyd Morris

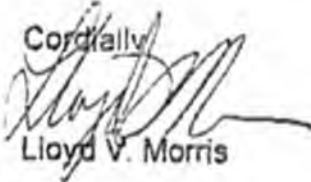
Subject: HB 158

I wish to voice my support for *HB 158 Tort Reform*.

Alaskan Business and Citizens need laws that put in better balance the intents of our legal system and abolish the abuses. I believe *HB 158* is working in this direction.

I urge you to support this Bill.

Cordially,



Lloyd V. Morris

LVM:bmh

MAY - 7-95 SUN 13:56 JENSEN
CAROL JENSEN
4800 E. 112th Avenue
Anchorage, Alaska 99516-1612
(907) 346-3321

P. 01

*Please distribute
to all members
of Cmte.*

May 7, 1995

To: Senate Judiciary Committee

RE: HB 158

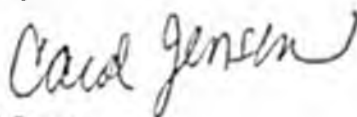
I am opposed to this bill, but my messages to legislators have apparently been ignored. I'm sure I am not alone in my opposition.

This is a strong anti-consumer, anti-public bill. It protects the guilty while further punishing the innocent victims. I agree that some lawsuits are frivolous. However, these could be eliminated by passing legislation to the effect that "a reasonable degree of negligence or error must be shown before a damage lawsuit can be initiated" and caps put on damage awards. This would go a long way toward reforming the system and eliminate the "spilled hot coffee at MacDonalds" type of lawsuits.

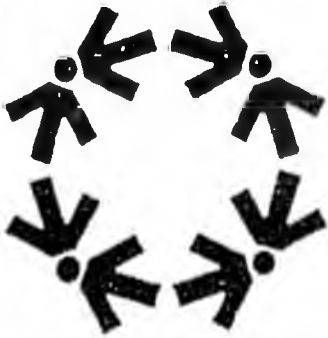
On the other hand, a great many lawsuits, especially involving death and dismemberment due to a negligent or poor quality doctor, or poorly designed building, toy etc. are legitimate and victims should be compensated for loss of wages, medical costs and punitive damages for themselves and their families. Otherwise, you have an open invitation for professionals that are trusted by the public to be negligent and careless, knowing that the law protects their actions. They may end up hurting scores of innocent people. Ill effects of exposure to certain procedures or chemicals are not always known until many years later. The guilty party or parties should be held accountable no matter how long it takes the effects to surface.

The Congress is already hard at work to pass legislation similar to Rep. Porter's. I don't think the State Legislature should waste anymore time on this.

Thank you,



Carol Jensen



AKPIRG

ALASKA PUBLIC INTEREST RESEARCH GROUP

Post Office Box 101093 / Anchorage, Alaska 99510-1093

(907) 278-3661 FAX (907) 278-9300

April 4, 1995

Governor Tony Knowles and Members of the Legislature
State Capitol
Juneau, Alaska 99801

Re: HB 158 - The So-Called "Tort Reform" Bill.

Dear Governor Knowles, and Members of the Legislature:

I have reviewed House Bill 158 at the request of the Alaska Public Interest Research Group. The provisions of this bill are nothing short of radical. Their effect will be to unjustifiably punish ordinary citizens. The bill's provisions, whatever their intentions, in fact are harmful to citizens who have been victims of injustice. That is, the bill punishes people who file just and valid lawsuits; it punishes people who have played by the rules, and who have pursued only legitimate grievances. At the same time, it benefits wrongdoers, insurance companies who do not wish to pay valid claims, and the attorneys who represent these special and usually wealthy interests. For example, the punitive damages provision subsidizes and protects wrongdoers who not only cause injury, but who do so "maliciously". This bill is ill-advised. By subsidizing wrongdoers at the expense of the innocent public, HB 158 will ensure that citizens live in a less just, less safe, and less desirable society.

The playing field in this nation's state and federal courts is already tilted in favor of wealthy defendants. HB 158, if enacted, will only make the process for those who seek justice, but are of average and low incomes, more hazardous and difficult than it already is. Alaska has a proud tradition of protecting its citizens. It has passed comprehensive hazardous substance laws, and has enacted laudable civil rights laws. HB 158 departs from this tradition. I have reviewed this bill in detail, and summarize some, but not all, of my concerns in the attached memorandum.

I urge that you oppose passage of this bill. I would ask that you work instead on measures that: 1) provide for equal access to the courts for Alaskans of average and low incomes, and, 2) protect the public's health and safety. HB 158 undermines both of those goals.

Sincerely,

Ralph Nader
P.O. Box 19312
Washington, DC 20036
202-387-8014

MEMORANDUM

To: Governor Knowles and Members of the Alaska State Senate and House of Representatives.

From: Ralph Nader

Re: Summary of Concerns About HB 158.

Date: April 4, 1995.

I have reviewed HB 158, and highlighted some of my concerns about this bill below.

1. IMMUNITY FROM SUIT AFTER EIGHT YEARS: Section 2 of HB 158 would lock the courthouse doors to innocent citizens who have been hurt by the carelessness of others. It does so by preventing them from seeking justice by a date in advance of the time they suffer pain, or should have learned that they have suffered injury. Section 2 proposes an eight-year "statute of repose." The statute would allow some wrongdoers full immunity from suit provided that their misconduct and errors do not cause discoverable injuries within the first eight years of their conduct. Thus, children rendered sterile by a physician's malpractice; movie-goers injured by a negligently-designed roof that collapses eight years and one month after the theater was constructed; and families forced to litigate against aggressive outsiders because a lawyer negligently drafted a will ten years previously would have absolutely no recourse against the people that were paid good money for their bad work in prior years. Examples of injuries that are not discovered, or which do not develop within eight years of a defendant's misconduct include cancers, birth defects, and other serious maladies.

HB 158's radical eight-year cutoff puts all Alaskans at risk that they will be seriously injured and have no rights to seek compensation from those whose misconduct caused their plight by letting wrongdoers off the hook after eight years. The law currently provides a deterrent effect that causes people to act responsibly, and with the interest of public safety in mind. Section 2 will encourage wrongdoers, by immunizing them for their misconduct, to increasingly act without regard to the public interest, and the public's health and safety.

2. RENDERING THOSE WITH THE MOST POWER IMMUNE FROM PUNISHMENT: Sections 6 and 7 would limit punitive damages to \$300,000 or three times compensatory damages. Currently punitive damages are allowed only to punish people found, by "clear and convincing" evidence, to have engaged in outrageous or malicious conduct, either intentionally or recklessly. Such people and businesses are not deserving of a state subsidy. It is outrageous that the Legislature would pass a law to protect these people.

The arbitrary cap on punitive damages effectively renders the wealthiest individual and corporate actors immune from meaningful punishment. Under the proposed law, any entity that

can afford to occasionally pay (when and if it gets caught) \$300,000 or three times compensatory damages, can afford to behave recklessly toward or to intentionally hurt Alaskans. This section, like others, immunizes those least deserving of protection for their gross misconduct, and invites them to increasingly act without regard to the public interest, and the public's health and safety.

3. SHUTTING THE COURTHOUSE DOORS TO ALL BUT THE WEALTHIEST ALASKANS: Section 14 of HB 158 makes a small, but significant change to an existing rule that would make filing suit too financially risky for any but the most affluent Alaskans. The current "Offer of Judgment" rule allows a person who makes a reasonable settlement offer a moderate award if he or she does better at trial than the amount of his or her offer. Section 14 would allow the person offering settlement their **full costs and attorney fees** if they managed at trial to beat, even by one dollar, their offer. Given that corporate attorneys charge in the range of \$160 - \$225 per hour for their work, this provision will result in attorney fee awards of hundreds of thousands of dollars to wrongdoers.

The proposed change would turn litigation, already expensive and risky, into a game of "Russian Roulette." Most litigation lasts well over one year; often two or three years elapse between the filing of the complaint and trial. An Alaskan of moderate income cannot afford to pay an insurance company's lawyer or lawyers for three years of litigation bills if his or her lawyer guesses wrong about what the jury will do with the damages portion of the case.

For example, consider a person whose back is badly injured by a toxic and defective product, or in a car wreck that was not his fault. Prior to the injury, the person had started a new job as a maintenance mechanic and had worked there for two weeks. He has three children and equity in a home. He files suit against the person who caused his injury. The savvy insurance company makes an offer of judgment of \$30,000, which, by rule, is open for 10 days. The injured worker does not yet know how long he will be off work or if his new job will be waiting for him when the doctor releases him to work. He does not know what his medical bills will be or what his long-term prognosis will be. He is afraid that \$30,000 will not cover his damages. However, his lawyer tells him that if he goes to trial and gets one penny less than \$30,000, he will now be liable to pay an attorney's fee that could well exceed \$100,000. If he is of ordinary means, he cannot afford to expose his family to the risk of that kind of liability. He is forced to accept the insurance company's offer.

It is the rule rather than the exception that damages cannot be fixed with certainty. Given this, Section 14 will in the broad run of cases force people to settle for pennies on the dollar for their injuries. This will in almost all cases ensure that citizens recover much less than full compensation for their injuries. It will, again, eradicate the current deterrent effect of the law such that wrongdoers will see it in their financial interest to cut corners, and act irresponsibly.

4. NO GRACE PERIOD FOR CHILDREN: Currently, Alaska law protects children from having to file a lawsuit until after they reach the age of 18. Section 4 of HB 158 would require children to become litigants within two years of suffering an injury, or be forever barred

from bringing suit. Section 4 would expose already injured children to the rigors of cross-examination and trial. It would put the parents or guardians of these children under enormous pressure to avoid asserting their child's rights to avoid further traumatizing their child.

5. ARBITRARY LIMITS FOR THE MOST SERIOUSLY INJURED: Section 5 of HB 158 would cap damages for pain, suffering, inconvenience, physical impairment, loss of enjoyment of life and loss of consortium to \$300,000. The cap would be raised to \$500,000 for quadriplegics, or those suffering permanent loss of a limb or permanent loss of cognitive ability.

This bill hurts the most gravely injured Alaskans. It hits hard at those who need the right to seek justice the most. This section damages only the most seriously injured - and only the people who have suffered the most injustice. Again, it acts as a subsidy to wrongdoers, and encourages conduct that places the public's health and safety at risk. An example illustrates the inequities of this section. Consider a teenage girl who suffers a broken leg in a bad car accident. She will likely receive full and fair compensation for her minor pain and suffering, loss of time from sports and school, etc. However, her friend and fellow passenger suffers a mutilated face, a crushed pelvis (rendering her an unlikely candidate for childbirth), and severely impaired and lacerated hands in the same accident. This friend, whose entire life has been horribly altered, is arbitrarily limited to \$300,000 in damages (minus court deposition costs, witness costs, exhibit costs, and attorney's fees) for pain and suffering, physical impairment and loss of enjoyment of life that will last throughout her lifetime.

Limiting loss of consortium to \$300,000 is grossly unfair to the survivors of deceased family members who worked inside the home or who lived a rural subsistence lifestyle. The two children of a doctor who is killed in an accident will be handsomely compensated for a large lost stream of income. The six children of a stay-at-home mom or a subsistence provider will be limited by an arbitrary, and often inadequate cap on damages, as these deceased parents, under HB 158, were producing no "traditional" monetary income.

CONCLUSION: The changes proposed by HB 158 arbitrarily benefit the wealthiest entities at the expense of smaller Alaskan businesses and hard-working citizens. This memorandum highlights some of the more drastic of these proposals: the one that protects those who maliciously, intentionally or recklessly hurt Alaskans; the one that caps recovery for the most severely injured Alaskans; the one that offers immunity to those wrongdoers lucky enough to have their errors go undetected for eight years; the one that requires Alaskan children to become litigants; and the one that would force any Alaskan of average or above-average means to accept early low-ball settlement offers from insurance companies to avoid the risk of bankruptcy.

HB 158 cloaks dangerous, harmful policies with misleading rhetoric. The real goals of tort reform, are not fairness, predictability, and equal access to the court system. Instead the civil justice system in Alaska could be seriously damaged by the cruel measures proposed in HB 158 by the defendants' lobby. I urge you to help expose these dangers in HB 158 and to work to defeat it.

FAX

Date

Number of pages including cover sheet

2

TO: *Senator Taylor*

FROM:

*Friedman, Rubin & White
1227 W. 9th Avenue,
Suite 21
Anchorage, AK 99501*

Phone

Fax Phone

Phone 907-258-0704

Fax Phone 907-279-6449

CC:

REMARKS: ☐ Urgent ☐ For your review ☐ Reply ASAP ☐ Please Comment

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Ex-Tort Reformer's Son Carries on the Fight

His father was an insurance lobbyist but had a change of heart before he died.

BY ANDREW HEUM

Illustration by Robert R. H. H. H.

BEHIND THE often abstract tort reform battle human tales of pain and suffering, and for one Indiana family—the family of the late Frank Cornelius—the debate has hit home with particular force.

Mr. Cornelius was once a lobbyist for Indiana's insurance companies, promoting change to the state's tort system. Then, after a series of mishaps left him in a wheelchair, he became a tort reform advocate. He died March 1, 1990, as the state legislature in Indiana and the Congress in Washington, D.C., moved ahead on tort reform bills. A son has taken up the fight against limiting the victims' rights.

Mr. Cornelius, who wrote and talked extensively about the evils of tort reform, said he had firsthand knowledge from both sides of the debate. As a lobbyist for the Insurance Institute of Indiana, he argued that in 1975 he had helped pass what was then one of the nation's first tort reform bills, one that capped total damages in medical malpractice at \$500,000.

But in the early 1980s, after the mishaps left him seriously injured, he became as tough a foe of reform as any trial lawyer. He wrote numerous guest columns for newspapers, worked with public groups in several states and allied with John Nader's Public Citizen to testify against tort reform.

After his death at age 50, his son, Todd, decided to take up his father's legacy. He has testified against a new tort reform bill before the Indiana legislature, worked with the Indiana Trial Lawyers Association and expressed an interest in aiding tort reform efforts at the federal level.

Todd told legislators his father turned his back on tort reform. "The only thing tort reform helps is the insurance companies and big business at the expense of people like my dad—and our family,"

younger Mr. Cornelius said. "My father said, 'Nobody has to die sometime—but not everybody has to go through what I've been through.'"

In his testimony before Indiana lawmakers, Todd Cornelius also handed out a posthumous statement from his father, said the late Mr. Cornelius, who needed a respirator and also took medicine 24 hours a day. "I have a unique perspective. I used to be a lobbyist for the insurance industry in Indiana. This legislation is bad. It will keep present people like myself from suing lawyers for injuries or it will make it extremely difficult to prove cases."

And until the ability of everyday Hoosiers to having their day in court, Mr. Cornelius said. "I learned the hard way that I made other people learn the way I did."

4000 Injury

According to Todd, Mr. Cornelius hurt his knee in 1969, had arthroscopic surgery and contracted the degenerative nervous disorder known as reflex sympathetic dystrophy. He called his doctor, who had gone visiting, and was told to wait for his return to schedule an appointment. It was too late. He underwent physical therapy. But the therapist misread instructions on a machine and sent a jolt of electricity through his leg, rendering the disorder incurable.

In 1980, Mr. Cornelius had surgery to install a Nerve Conduction Study. Doctors used the wrong instrument and punctured several holes in the vein from his groin to his heart. "My father could have died in death bed but not called for help," said Todd. "A physician trying to save his life punctured his lung."

In more than \$5 million, he told reporters. He sued a hospital and physical therapist and settled for \$100,000, the highest amount allowed under the law he had helped enact. He also settled a products liability suit for \$100,000. In another products suit he sued, a judge ruled Feb. 17 for summary judgment for the defendants, Cornelius v. Cook Inc., 88001-9205, 201866 (Super. Ct., Marion Co.).

The current Indiana tort reform package, which passed the state House and deadlined 5-3 on April 3 in a Senate committee, has four provisions, bringing comparative fault into products liability cases for the first time, a loser pays provision with a ceiling of \$1,000, a punitive damages cap of three times compensatory damages, of which 75 percent goes to a state fund, and a government standards defense.

'Rude Awakening'

Though the current state proposals are not specific to medical issues, Mr. Cornelius said the bill covers a wide range of products liability issues and, he noted, an allegedly defective product was a culprit in his father's injuries. Said the younger Mr. Cornelius, 25, a theology student, "Once Dad passed away I decided since he would not do it someone needed to tell his story and I was the only one in the family willing to do it."



Convert: After an injury led to grave disorders, Frank Cornelius became an ardent critic of tort reform.

Mr. Borman, assistant director of the Indiana Trial Lawyers and director of the Hoosier Alliance for Consumer Rights, applauds Todd's efforts, despite his inexperience. "He's never done this before," said Mr. Borman, noting that for a newcomer to legislative battles, seeing votes on political grounds rather than the merits can be hard to take. "It's a rude awakening."

Mr. Borman said he had not heard of the elder Mr. Cornelius until a 1990 Indianapolis Star series on medical malpractice, the two finally met about 13 months ago, when Mr. Cornelius' anti-tort reform efforts kicked into high gear. By that time, he was working with the National Center for Patients Rights, which hooked him up with Mr. Nader's Public Citizen for testimony in Congress last year on medical malpractice, said Pamela Gilbert, former director of Public Citizen's Congress Watch.

Mr. Borman isn't sure of the ultimate effect of the elder Mr. Cornelius' activities. "He sensitized the public to what the real impact of these types of [reform] can have on victims and their families," said Mr. Borman. "Did he change votes? I don't know. Did he make people realize what caps do? Yeah, I think so."

No Overall Cap?

But American Tort Reform Association President Sherman Joyce, whose group has long pushed for state reforms, pointed out that the bill Mr. Cornelius said he helped pass and later blasted was not the kind ATRA has lobbied for.

"We focus on non-economic damages as opposed to an overall cap," he said. The model that ATRA endorses is based on California's Medical Injury Compensation Reform Act of 1975, which set a cap of \$250,000 on non-economic damages in medical liability cases but allowed for a better payment of future medical costs without a limit.

"His situation was tragic," said Mr. Joyce.

Said if he was concerned about the impact of the younger Mr. Cornelius on the debate in Indiana, Mr. Joyce said, "I'm not close enough to make a judgment. We understand legislative efforts are under way in Indiana, and Mr. Cornelius is free to express himself to make his case."

Adele Lash, a spokeswoman for the Indiana State Medical Association, said she was not familiar with the details of the Cornelius saga, except for what she saw in local news coverage. But she added, "We will think that our law works and has worked for the last 20 years."

Parting Shot

But the exact role of Mr. Cornelius in helping enact the law he came to loathe was called into question by his former employer, the Insurance Institute of Indiana. The group's president, Stephen Williams, said Mr. Cornelius lobbied for the association but the institute did not have an active role in that specific legislative debate.

"This is no negative reflection on Frank," said Mr. Williams. "That is the way things worked back then." He added that he noticed Mr. Cornelius claimed he had a key role in passage of the medical malpractice act. "That's not true," he said, adding that it was more of a team effort.

Mr. Williams went on to say he could not speculate on Mr. Cornelius' true motives in his campaign against tort reform.

Todd Cornelius said every state representative he has spoken to so far remembered his father's role in lobbying for the bill. "He did have a lot to do with it," said the younger Mr. Cornelius, noting he is not surprised the insurance industry is distancing itself. "Big business says what is good for them and will make them feel good."

The trial lawyers Mr. Borman acknowledged it may be true no one fully remembers who did what 20 years ago except for anecdotal recollections, but that is beside the point.

"It is highly ironic that a guy who worked in that position at the time got injured later and then philanthropically switched," said Mr. Borman. "Frank changed his belief because of what happened to him personally."

In one of his guest columns, Mr. Cornelius issued a parting shot in the injustice he said he both helped create and suffered from. "Medical negligence cannot be reduced simply by restricting legal rights," he said.

CAUSE AT A GLANCE

VENUE: Hearts and minds of Indiana legislators and public

PROTAGONISTS: Frank Cornelius, deceased; Todd Cornelius, neophyte lobbyist

STAKES (SHORT-TERM): Further tort reform initiatives in the state

STAKES (LONG-TERM): Federal tort reform legislation and plaintiffs' access to the courts

SUMMARY: Erstwhile tort reformer Frank Cornelius is injured, his treatment lead to a conversion. Mr. Cornelius turns into a plaintiffs' advocate but dies. His son takes up the fight.

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Tragedy Alters Lobbyist's Views

Damages capped for tort reformer injured by malpractice

While a lobbyist for the insurance industry, Frank Cornelius helped push through legislation that rewrote tort law in Indiana. The medical malpractice legislation that was passed in 1975 came at the dawn of the tort reform movement, and included a cap on damages associated with several such laws.

Cornelius, 49, has lived to rue his role in that legislation, speaking out through op-ed pieces and interviews.

"I think tort reform as we know it is totally bad," he said. "We have a judicial system that I found quite adequate if allowed to function its own way."

Knee Surgery Gone Awry

What changed Cornelius' mind on tort reform was a series of nightmarish incidents beginning in February 1989 when he underwent arthroscopic surgery on his knee.

After returning home he began experiencing pain and made several calls to his doctor who, he reports, told him to get a bedpan and then left on a skiing trip. The pain did not subside, and consultation with another doctor showed he was suffering from a degenerative nerve disorder often caused by trauma or infection resulting from surgery.

This was only the beginning. During physical therapy his condition was complicated by receiving an electric shock when a therapist misread instructions on a medical device. In August 1990, a doctor using the wrong instrument left holes in the main vein of Cornelius' leg. Still another doctor punctured Cornelius' left lung while trying to save his life.

As a result, Cornelius uses a wheelchair and needs a respirator to breathe. He has been told he has about two years to live. He claims his medical costs and lost wages amount to more than \$5 million.

Cornelius sued the hospital and physical therapist, settling for \$500,000, which was the total amount of damages allowable for a single malpractice incident under legislation he helped get passed. The limit has since been raised to \$750,000.

He also has settled a product liability suit for \$100,000 and receives workers compensation. After subtracting attorney fees, Cornelius estimates he has netted close to \$400,000 in damages.

He acknowledges there is an aspect of poetic justice in his fate. But he adds, "If

there is a God, and I believe there is, what happened to me has a purpose. It changed my way of thinking and looking at things."

It obviously has changed his way of thinking on tort reform. In an Oct. 7 article in *The New York Times*, Cornelius writes: "Medical negligence cannot be reduced simply by restricting consumers' legal rights. That will happen only when the medical industry begins to effectively police its own."

Sherman Joyce, president of the American Tort Reform Association (ATRA), said of Cornelius' situation: "Obviously this is very unfortunate. I suspect it is not typical."

He said Indiana made a "good faith" effort to deal with rising medical costs in the state by placing limits on liability.

"In defense of this statute it is important that one single incident not be used to demonstrate its unfairness," Joyce said. "You can probably find a single incident under any circumstances."

Nonetheless, the reforms pushed by ATRA are not as harsh as Indiana's early legislation. The group doesn't support a limit on economic damages but does support caps on noneconomic damages like pain and suffering. "We just want balanced and fair rules," Joyce said.

—Henry J. Reske



Frank Cornelius

Alaska State Legislature

Sen. Robin Taylor, Chairman
Sen. Lyda Green, Vice Chairman
Sen. Mike Miller
Sen. Al Adams
Sen. Johnny Ellis



State Capitol
Juneau, Alaska 99801-1182
(907) 465-3717
Fax: (907) 465-3922

Senate Judiciary Committee MEMORANDUM

TO: Members of the 19th Alaska State Legislature

FROM: Senator Robin L. Taylor *RLT*

DATE: April 27, 1995

RE: Tort Reform

Product Liability Suits brought by grieving members of families left behind have encouraged this type of responsible behavior by companies like Bernzomatic. IN 33 YEARS OVER 40 CARBON MONOXIDE POISONING DEATHS HAVE BEEN ASSOCIATED WITH THE USE OF THIS HEATER.

SAFETY WARNING

Bernzomatic Portable Heater Recall

Bernzomatic repeats its recall of its 30-year-old Model TX900 & TX900A portable Gas Radiant Heaters due to the risk of Carbon Monoxide Poisoning.

Stop Using This Heater!

Carbon Monoxide is an odorless and colorless gas - you can't see or smell it, but it can cause serious injury or death. Over 40 Carbon Monoxide poisoning deaths have occurred since 1963 in association with the use of the heater in poorly ventilated areas. The most recent occurred in 1994. The company believes that some of the original 38,000 heaters may still be in homes, garages, camping areas, etc.

Bernzomatic will refund \$250.00 for each Bernzomatic Model TX900 or TX900A heater that is returned to Bernzomatic. Check your heater today to see if it meets the description below. If it does, call Bernzomatic immediately. 1-800-625-7811 (8:00 a.m. - 4:30 p.m. EST Monday - Friday).

The heater is housed in a green metal cabinet approximately 3 inches wide x 14 inches high x 7 inches deep with room made for one or two 18" or propane gas cylinders. The name Bernzomatic appears on the front of the heater. The name Bernzomatic, the model number TX900 or TX900A and the description Bernzomatic Gas Radiant Heater appear on the instructions on the inner side of the heater door.



BERNZOMATIC

Without Product Liability Suits there will be no reason for companies to take responsible action to stop the careless killing of innocent people.

Are you sure you understand TORT REFORM?

Tim and Barb Dooley
643 "O" Street
Anchorage, Alaska
99501
(907) 274-7068

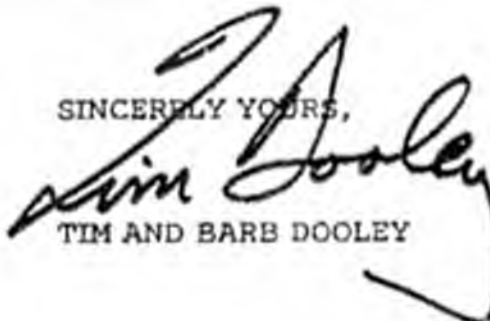
DEAR SENATOR:

SUBJECT: PLEASE VOTE AGAINST THE TORT "REFORM" BILL

WE ARE LIFELONG REPUBLICANS, BUT WE ARE ASHAMED THAT THE
REPUBLICAN PARTY IS PUSHING THE TORT "REFORM" BILL. WHY WOULD
YOU WANT TO LIMIT PUNITIVE DAMAGES TO ONLY \$300,000 AGAINST
SOMEONE WHOM A JURY HAS FOUND HAS ACTED INTENTIONALLY,
MALICIOUSLY, AND OUTRAGEOUSLY? REP. PORTER SAYS THIS BILL
PROTECTS BUSINESS. ARE YOU REALLY PROTECTING BUSINESS? SMALL
BUSINESS? WHY DO YOU WANT A BUSINESS OPERATING THAT A JURY HAS
FOUND HAS ACTED INTENTIONALLY, MALICIOUSLY, AND OUTRAGEOUSLY?
WHY WOULD THIS BE GOOD FOR ALASKANS?

IF A CIVIL LAWSUIT WAS BROUGHT AGAINST THE OKLAHOMA
TERRORISTS, THIS BILL WOULD LIMIT THE PUNITIVE DAMAGES AGAINST
THEM TO ONLY \$300,000. (OR REQUIRE INDIVIDUAL LAWSUITS BY SEVERAL
HUNDRED PLAINTIFFS AND THUS CLOG THE COURTS.) THIS IS AN IDIOT'S
BILL. PLEASE VOTE AGAINST THIS BILL!

SINCERELY YOURS,


TIM AND BARB DOOLEY

RECEIVED MAR 17 1995

LAW OFFICES OF
CLIFFORD H. SMITH
A PROFESSIONAL CORPORATION
620 DICK STREET, SUITE 201
KETCHIKAN, ALASKA 99901
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DENNIS L. MCCARTY

Facsimile
(907) 225-6441

VIA FACSIMILE 907-465-3922

March 16, 1995

Senator Robin Taylor
State Capitol, Room 30
Juneau, Alaska 99801-1182

Dear Robin:

I thought I would give you my thoughts about the tort reform legislation.

First off, for myself and the rest of the Ketchikan Bar Association, we would like to thank you for your efforts to forestall the effort to pass this legislation.

Secondly, I understand that you are under a great deal of pressure from your Republican colleagues to not block the bills this time around. I also understand how you might feel alone in your efforts and you might wonder if the effort is worth it.

As you know, I am conservative and so are many of the other members of the K.B.A. However, I know of none of the members who support this effort for change. The reasons for this are numerous but some are apparent. The lower part of Southeast Alaska is a blue-collar community. It is composed of loggers, fishermen, construction workers and miners, the very population base that would be most hurt and affected by this legislation. These are the people who have dangerous jobs and occupations. These are also your constituents. You have a conservative base but it is blue-collar conservatism, not fat cat Anchorage conservatism. In addition, most of the K.B.A. members and yourself have experience with claims and have dealt with insurance companies. If we believe that this legislation will benefit anyone or anything other than their respective pocket books, I have some extra swampland in Florida to sell the folks of Alaska.

One last purely political observation. You will never be defeated by a Democrat because you voted against and stopped this from happening to the good people of Alaska.

File Tort Reform

CLIFFORD H. SMITH

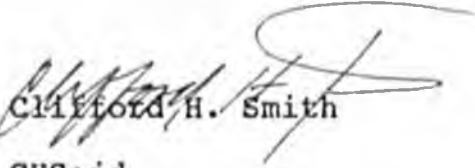
A Professional Corporation

Senator Robin Taylor
March 16, 1995
Page 2

Keep up the good work and you are not alone.

Remember Cliff Taro supported Campbell.

Yours truly,



Clifford H. Smith

CHS:jd

cc: Rick Friedman
Debra Gravo

FAX**TRANSMITTAL**To: SENATOR ROBIN TAYLORFax No. 907-465-3922 Date: 3/16/95From: CLIFFORD H. SMITHFile No. _____ Operator: jdPages: 3 (Including Cover Sheet)Documents sent: Letter dated 3/16/95Original to follow via: mail ☒ - no original to follow ☐

Message:

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Second error at hospital leads to death

The Associated Press

TAMPA, Fla. — The same hospital where a surgeon amputated the wrong leg of a patient is acknowledging another mistake — two weeks later — that led to the death of a 77-year-old man.

Leo Alfonso died March 3 after a respiratory technician at University Community Hospital mistakenly removed his ventilator.

Alfonso died less than an hour later, though health care workers tried for 30 minutes to revive him.

The employee should have checked the patient's identity visually, by speaking to him, by reading his chart and by checking his identification.

The hospital said the worker, who has been employed for 2½ years, has a clean record. She was suspended.

On Feb. 20, a surgeon at the hospital amputated a diabetic man's left leg below the knee, though it was his right leg that was supposed to have been removed.

University Community Hospital blamed the amputation mistake on a communication breakdown.

Crushed by My Own Reform

By Frank Cornelius

In 1975, I helped persuade the Indiana Legislature to pass what was acclaimed as a pioneering reform of the medical malpractice laws: a \$500,000 cap on damage awards, and elimination of all damages for pain and suffering. I argued successfully that such limits would reduce health care costs and encourage physicians to stay in Indiana — the same sort of arguments that now underpin the medical industry's call for national malpractice reform.

Today, from my wheelchair, I rue that accomplishment. Here is my story.

On Feb. 22, 1989, I underwent routine arthroscopic surgery after injuring my left knee in a fall. The day I left the hospital, I experienced a great deal of pain and called the surgeon several times. He called back the next day and told my wife to get me a bedpan. He then left on a skiing trip. I sought out another surgeon, who immediately diagnosed my condition as reflex sympathetic dystrophy — a degenerative nervous disorder brought on by trauma or infection, often during surgery.

A few months later, when a physical therapist improperly read the instructions on a medical device, I received a tremendous current of electricity through my left leg. This seriously complicated my condition.

In August 1990, another physician proposed a medical procedure, but used the wrong instrument; that left me with several holes in the vena cava, the main vein from the legs to the heart. I would have bled to death in my room if my wife had not come to see me that evening and called for help. As another physician tried to save my life, he punctured my left lung.

The cost of this cascading series of medical debacles is painful to tally:

- I am confined to a wheelchair and need a respirator to keep breathing. I have not been able to work.
- I have continuous physical pain

Frank Cornelius is a former lobbyist whose clients included the Insurance Institute of Indiana.

in my legs and feet, prompting my doctor to hook me up to an apparatus that drips morphine. My pain used to rate a 10 on a scale of 1 to 10. Now it's about a 4.

- Twice, I have received last rites from my church.

- My marriage is ending, and the emotional fallout on our five children has been difficult to witness, to say the least.

- At the age of 49, I am told that I have less than two years to live.

My medical expenses and lost wages, projected to retirement age if I should live that long, come to more than \$5 million. Claims against the hospital and physical therapist have been settled for a total of \$500,000 — the limit on damages for a single incident of malpractice. The Legislature has since raised that cap to \$750,000, and I may be able to collect some extra damages if I can sue

I lobbied for
limits on
malpractice suits.
Now I'm sorry.

those responsible for the August-1990 incident that nearly killed me. But apparently because of bureaucratic inertia, the state medical review panel that certifies such claims has yet to act on mine.

The kicker, of course, is that I fought to enact the very law that limits my compensation. All my suffering might have been worthwhile, on some cosmic scale, if the law had accomplished its stated purpose. But it hasn't.

Indiana's health care costs increased 139.4 percent from 1980 to 1990 — just about the national average. The state ranked 32d in per capita health care spending in 1990 — the same as in 1980.

It's understandable that the damage cap has done nothing to curb health care spending; the two have almost nothing to do with each other. In 1992, the Congressional Budget

HEALTH CARE
SECOND OPINIONS
An occasional series.

Office reported that medical malpractice litigation accounted for less than 1 percent of total health care spending. I doubt that the percentage in Indiana is much different.

Proponents of Indiana's damage cap argue that doctors here pay less for malpractice insurance than their colleagues in other states. What they don't say is that malpractice premiums are artificially low because insurers need to offer only \$100,000 of coverage. Negligently injured patients who are entitled to more than \$100,000 must look to Indiana's state-run excess compensation fund.

Because that fund is supported by a surcharge on doctors, the true cost of malpractice insurance in Indiana can be calculated only by adding premiums and surcharges together. And the surcharge for the compensation fund has ballooned.

Doctors and insurers have spent millions propagating the myth that America is awash in unjustified malpractice suits and crazy jury verdicts. And apparently they have captured the attention of the President and Congress: malpractice damage caps were part of many health care measures in Congress this year, and they are sure to be back when the issue resurfaces in the next session.

The prospect that these "reforms" will be enacted is frightening. Make no mistake, damage caps are arbitrary, wholly disregarding the nature of the injury and the pain experienced by the plaintiff. They make it harder to seek and recover compensation for medical injuries; extend unwarranted special protection to the medical industry; and remove the only effective deterrent to negligent medical care, since the medical profession has never done an effective job of disciplining negligent doctors.

Medical negligence cannot be reduced simply by restricting consumers' legal rights. That will happen only when the medical industry begins to effectively police its own. I don't expect to live to see that day.

New York Times, Oct. 7, 1994

Juries Are Just Saying No

By Russell F. Moran

THE Common Sense Legal Reform bill, soon to be considered by Congress, is the magnum opus of the tort reform movement. This item in the "Contract With America" would make major changes in Federal civil litigation, especially concerning product liability suits and punitive damages, all in response to a perceived groundswell of dubious lawsuits.

But there is a problem: It's too late.

The tort reform movement has already been heard, loud and clear, by its target audience: the jury. Jurors have listened attentively to the argument that American business, staggering under the burden of giant verdicts, is losing its competitiveness. If you are a doctor or a homeowner, the reformers have argued for years, insurance premiums will keep skyrocketing because greedy trial lawyers and their clients are out to get you.

Well, the jury is in, and the verdict is for the defendant — and his insurance company. Civil juries are finding for the defendant as never be-

fore. In New York (where litigation is so intense it could use a musical score), there is a clear pattern, and it is most dramatic in product liability lawsuits. From 1981 to 1987, 51 percent of the verdicts in these cases were in favor of the defendant. In the next seven-year period, 1988 to 1994, that rate rose to 62 percent. The trend is mirrored nationally, and it flies in the face of the conventional wisdom that product liability verdicts are strangling American industry.

The trend is also clear in the number of cases filed. From 1985 to 1991, the number of product liability cases (excluding asbestos claims) in the Federal courts decreased by 40 per-

Too late for tort reform. We have it already.

cent. Not only are product liability verdicts going for defendants, but defendants' odds of winning are improving in negligence cases in general, including ordinary motor-vehicle and slip-and-fall lawsuits. In New York, defendants are now winning 44 percent, compared to 41 percent seven years ago.

And how goes the medical malpractice "crisis"? Here, too, New York juries have been illing toward the defendant. Verdicts for physicians in malpractice cases increased from 60 percent in 1981-87 to 63 percent in 1988-94. A recent national study showed that doctors win 71 percent of the time — this despite a Harvard Medical School finding that in one recent year in New York State alone, 23,000 to 31,000 patients suffered injuries while hospitalized, leading to as many as 7,000 deaths. (These are medical, not legal, statistics.)

Contrary to the rantings of the American Medical Association, only about 2 percent of people injured by a physician's negligence ever file suit, according to The New England Journal of Medicine. And those who do sue hardly clog the courts. Only 0.8 percent of medical malpractice cases go to trial, and only 5 percent go all the way to verdict.

While doctors are understandably upset over huge malpractice premiums, they should turn their ire toward the folks who collect them. According to the National Association of Insurance Commissioners, medical malpractice insurance is the most profitable line of business.

There is strong evidence that there was never a problem to begin with. A General Accounting Office study questioning the existence of a "litigation explosion" noted that only 10 percent of the seven million

CLINTON &



CONGRESS

cases filed in state courts across the country are tort cases of any kind. This is not surprising in light of a Rand Corporation study that of all accident victims, only 7 per-

cent receive compensation through the court system.

Just as the health care debate led to massive adjustments in the health system, so has the legal reform debate resulted in a new industry of arbitration and mediation known as alternative dispute resolution. An entire shadow justice system is sprouting before our eyes. Reform is here! But the reformers still clamor for more.

The tort system has grown with the accumulated wisdom of centuries of common law. Just as the criminal justice system is society's way of expressing disapproval of certain behavior, the civil justice system is society's way of righting it wrong by compensating the victim. To the extent that we tamper with the right to a day in court, we risk leaving that victim with nothing but anger and feelings of revenge, emotions that our society already has in superabundance. □

Russell F. Moran, a lawyer, is publisher of The New York Jury Verdict Reporter.

New York Times
Jan. 16, 1995

STEVE SIMS
1769 Wickersham Drive
Anchorage AK 99507
Phone: 563-7281

March 6, 1995

Senator Drue Pearce
Alaska State Senate President
State Capitol
Juneau, AK 99801-1182

Representative Gail Phillips
Speaker of the House
State Capitol
Juneau, AK 99801-1182

Re: Tort Reform

Dear Senator Pearce and Representative Phillips:

I was disappointed to read in the Anchorage Daily News on February 20, 1995 that like most everyone else, some of our legislators were persuaded by a three sentence sound bite in the case of McDonald's continual serving of scalding hot coffee. Even Dear Abby backed off on this one and admitted she made a mistake in criticizing the jury verdict after she received a letter from the attorney who won the case. (Enclosed summary)

Enclosed are two other fuller explanations of what happened in that case.

If you were to check with the Anchorage Natural Gas Company you would find out that hot water is not supposed to be set at more than 130 degrees and preferably, not more than 120 degrees. For every 10 degrees you increase temperature, there is a substantial and large increase in the degree of burn and the quickness of the burn. At 190 degrees it is a scalding and an instantaneous burn through all layers of skin.

I know about hot coffee from a personal experience having once bought a cup of coffee from McDonald's on Dimond Boulevard about 10 years ago, which left me with a blister on my lip when I tried to blow on it and take a small, quick sip. I have never gotten an actual blister on my lip sipping hot coffee elsewhere. The coffee was still not drinkable when it was time to leave the restaurant and I had already finished my meal. After all, this is a "fast food service" type of restaurant. The jury did not fail to understand that a business that sells "fast food" will not have any coffee refills if they leave their coffee at 40 to 50 degrees hotter than the normal standard coffee maker that people are used to dealing with. No refills means increased profit.

I respectfully submit that changing Alaska law will make no difference on what occurs to McDonald's in New Mexico anyway.

Senator Pearce/Representative Phillips

March 6, 1995

Page 2

There is virtually no such thing as an outrageous verdict that is upheld in civil law. If a jury renders too high a verdict in a civil case, the judge reduces it as they did in the McDonald's case.

You might note that the Exxon-Valdez 5 billion verdict was extensively criticized outside by corporate America and the Wall Street Journal. Which of the Alaska senators and representatives are going to say that that verdict was too high? But then you, like jurors, know the facts of the case a bit better than the press outside with their corporate advertisers demanding and getting editorials favorable to their position in the guise of news stories.

No tort attorney wants to take a ridiculous lawsuit because it will lose. He or she will not be paid. They will also have a dissatisfied client.

COURT AWARDED ATTORNEY FEES SHOULD BE ABOLISHED

When you preclude people from having their disagreements adjudicated--which are inevitable in any society--you basically send the message that one should arm themselves and settle their differences on the freeway as we see happening too often nowadays.

In a tribal society, if you have a problem with your neighbor, you can take it to the chief and the chief will sort it out without charging the subjects for his opinion. The same system exists in virtually all societies with different sophisticated levels and procedures. In Alaska, the Court system has already made it so no middle class person with assets of more than \$50,000 can go to court without possibly being wrong and incurring a huge judgment for costs and attorney fees against them because they guess wrong as to what the law is on close questions.

No other state in the union punishes people for litigating grey areas of the law or highly disputed factual situations like Alaska has since 1959. A few institutional corporate defendants like that law because it stops people from questioning what they do. The plaintiff trial lawyers like that law because it adds 10 to 20 percent to any judgment they get and they keep one-third of it. Nobody ever speaks out on behalf of the middle class and moderately monied people who cannot have their problems adjudicated without suffering the threat of bankruptcy. It seems the legislative members are either bought by the large corporations on the one hand or bought by the "liberals" on the other hand, and nobody stands up for the vast majority of people who are somewhere in the middle. God forbid they should ever have to settle a dispute in court in Alaska.

Senator Pearce/Representative Phillips
March 6, 1995
Page 3

CAPS ON AWARDS

With regards to the proposed caps on damages that tort reform proposes, I suggest you check how much it costs to raise your liability limits from \$100,000 to \$1,000,000 by the simple expediency of buying an umbrella policy for less than \$200. This Umbrella covers yourself and protects your family if you are hit by an uninsured drunken driver as well as affording you additional liability coverage. The amount of insurance that can be procured for very little extra money is one million dollars.

If any legislator were put in a wheelchair for life or brain damaged by a drunken driver, I do not suspect that they would think that half a million dollars was sufficient compensation when the lifetime costs of care alone would far exceed one million dollars.

Unfortunately all the proposed caps do is encourage insurance companies to never settle for the full amount of the cap because they can never be charged more than the cap. So when you place a \$300,000 cap on something, you really place a \$200,000 cap unless someone is willing to go all the way through the court system and incur the large costs and anxiety of doing so.

With the caps tort reform proposes, the Oil Companies could pollute and take their cases to Alaska State Court where their liability will be limited.

I would like this letter to become part of the record of testimony of any committees that consider bills in so called "tort reform".

We are all subject to manipulation and misinformation with sound bytes from this information age in which we live. This McDonald's case is just the latest example. It sounded outlandish to me until I tried Paul Harvey's diction, "And now you know the rest of the story."

Best regards,



STEVE M. SIMS

nls
MC/L5
Enclosure

cc: Representative Brian Porter
Senator Robin Taylor

Spotlight

JURY AWARDS PUNITIVE DAMAGES AGAINST MCDONALD'S FOR EXCESSIVELY HOT COFFEE.

Liebeck v. McDonald's Restaurants, N.M., Bernalillo County 2d Jud. Dist. Ct., No. CV-93-02419, Sept. 14, 1994.

Stella Liebeck, a 79-year-old retiree, bought a 49-cent cup of coffee from a McDonald's Restaurant drive-through in Albuquerque, New Mexico. Liebeck's grandson stopped the car so Liebeck could add cream and sugar. As she placed the styrofoam cup between her knees and tried to remove the lid, the entire contents spilled in her lap.

Liebeck suffered third-degree scalding burns to her inner thighs, penneum, and buttocks. She was hospitalized for eight days, and despite debridement and skin grafting, she suffered permanent scarring. Liebeck's injuries disabled her for two years. Her medical bills totaled about \$10,000.

Liebeck called on ATLA members Kenneth R. Wagner of Albuquerque and S. Reed Morgan and Jerry R. McKenney of Houston to represent her in a suit against McDonald's Corporation and the local franchisee.

Suit alleged the coffee had been defective because of (1) its excessive heat and (2) inadequate warnings. Plaintiff also asserted breach of warranties of fitness for a particular purpose and of merchantability in that the extreme temperature made the coffee unfit for consumption. Plaintiff sought punitive damages for McDonald's conscious indifference to its customers' safety, claiming it knew the coffee was dangerous but sold it anyway.

The franchisee was dismissed after McDonald's stipulated it had had control over the coffee, cup, and lid.

Morgan knew he faced an uphill battle in convincing the jury to find for his client, let alone award punitive damages. As the jury foreman later noted, "[I] wasn't sure why I needed to be there to settle a coffee spill."

Plaintiff presented evidence that in the 10 years before the accident defendant had received at least 700 complaints of coffee burns. At trial, counsel elicited testimony that McDonald's requires franchisees to serve coffee at 180 to 190 degrees Fahrenheit, while coffee brewed at home is usually between 135 and 140 degrees.

Charles Baxter of Dallas, Texas, served as plaintiff's burn specialist. He testified that 190-degree coffee causes full thickness burns—third-degree burns to the muscle/fat layer—in less than three seconds. Coffee served at 160 degrees, however, would have to contact the skin for about 20 seconds before causing a third-degree burn.

Baxter also pointed out that a liquid above 140 degrees cannot be consumed and that as its temperature increases, the rate at which it burns tissue increases exponentially. He testified that the fast food industry had failed to react to published warnings from the Shriners' Burn Institute in Cincinnati, Ohio, that the industry was causing serious scald burns by serving beverages above 140 degrees.

Plaintiff's warnings expert, Lila Laux of Denver, Colorado, told the jury that although people know coffee is hot, they do not know how severe burns can be. She said McDonald's should have had warnings indicating the severe risk of burns. Mechanical engineer Kenneth Diller of Austin, Texas, testified that considering the painful nature of burn injuries, the risk of harm was unacceptable.

Some of the most damaging evidence came from McDonald's own executives and consultants. Plaintiff's counsel elicited testimony that defendant (1) knew of the risk of severe burns from its coffee, (2) decided not to warn customers about the risk despite knowing most consumers would not recognize it, (3) knew its coffee was not fit for consumption as served, and (4) did not intend to change its policies in light of the evidence at trial.

During closing argument, plaintiff's counsel pointed out that McDonald's has laboratories and a school, "Hamburger University," devoted to the study of selling food and drink; yet despite 700 burn complaints over a 10-year period, it had never consulted a burn specialist or a thermodynamicist. Counsel estimated defendant's daily gross coffee sales were over \$1.3 million and suggested punitive damages equal to two days of coffee sales would send a message to McDonald's and others in the industry.

The jury awarded \$200,000 compensatory damages and \$2.7 million punitive damages. The compensatory award was reduced to \$160,000 for plaintiff's 20 percent comparative negligence, for a total of about \$2.9 million.

The trial court then reduced the punitive award to \$480,000, or three times the compensatory award.

The parties have now reportedly reached a confidential settlement.

Morgan wrote shortly after the successful verdict, "The evidence established that a consumer—through no fault of his or her own, or following a momentary inadvertence or mistake—can wind up with an excruciatingly painful, disfiguring, expensive, and possibly life-threatening injury. . . . Why did the company ignore what it knew? Why had it not studied the risk?"

JW

Dear Ann Landers...

Advice columnist Ann Landers included a letter in her January 16th column defending the famous jury verdict in favor of a woman who spilled a cup of hot McDonald's coffee in her lap. The letter was a result of an earlier column in which Landers wrote, "The once noble profession of law has sunk to a new low."

In response, plaintiff's attorney S. Reed Morgan of Houston wrote that the jury considered the severity of his client's injuries, which required skin grafts and kept her in the hospital eight days. He also cited the high number of McDonald's burn cases that preceded this one and the fact that no effort was made to change corporate operations.

"The civil justice system worked the way it is supposed to — to protect individuals from corporate indifference," Morgan wrote.

"And it is not just some lawyers doing that, it is a jury of 12 fellow citizens. That is the beauty of the American court system," he concluded.

"Thank you for reducing the heat and adding a little more light," Landers replied. "And now I think we should cool it."

FORUM / LETTERS

McDonald's coffee suit wasn't a travesty of justice

By JUDY ALLEN

My mother was burned severely by a cup of McDonald's coffee while seated in a parked car in a McDonald's parking lot in Albuquerque three years ago. She was trying to add cream and sugar to the coffee.

What she did not know is that McDonald's, by corporate policy, kept its coffee between 180-190 degrees. That meant that if she spilled it, it would cause life-threatening third degree burns in two to seven seconds.

Everyone expects coffee to be hot; people expect a shower to be hot. But they don't expect to be hospitalized by a cup of coffee or the shower.

My mother spent eight days in the hospital, received skin grafts and took more than two years to recover her health of today. The pain was excruciating. There is permanent scarring over 16 percent of her body.

McDonald's knew these facts. Yet, McDonald's wanted this case to go to trial and would not settle.

At trial, McDonald's own expert witnesses verified what our expert witnesses said.

They admitted the product was too hot for consumption when sold.

They did not contest the fact that it took 25 minutes to cool to a drinkable temperature.

The quality assurance manager from McDonald's then said, under oath, that they had an admittedly incomplete list of more than 700 burn cases. In fact, he was surprised that the number wasn't much larger. The number is now more than 1,000.

Our attorney pointed out that he had questioned this man several years earlier for a client with a similar severe burn. Thus, this executive admitted he was personally aware of the nature of the burns that come from the scalding hot product.

The manager also said he knew customers were not aware of the danger of third degree burns from the product. He admitted in the past six years he had done nothing to make the product safer. He had not consulted any burn expert. He stated he had no intention of turning down the heat, despite the fact many more people would be burned.

Further, McDonald's had spent money on a statistician to say in court that my mother and all the other burn cases were statistically insignificant, and thus, there was no reason for the corpora-

Everyone expects coffee to be hot; people expect a shower to be hot. But they don't expect to be hospitalized by a cup of coffee or the shower.

tion to do anything.

Our case pointed out that for every degree of temperature increase over 140 degrees, burns occur exponentially faster. The reasonable jury told this callous and irresponsible corporation that its behavior was unacceptable. The jury unanimously fined punitive damages of two days of coffee sales, which turned out to be \$2.7 million.

Judge Scott said of McDonald's:

"I think that there was evidence and argument about McDonald's knowledge that the coffee could cause serious third degree full tissue burns."

"I think the demeanor of the witnesses testifying as well as the subject of the testimony clearly indicates that McDonald's knew that the coffee, at the time it was served, was too hot for human consumption."

"I heard no evidence of any present intention to correct mat-

ters by simply turning down the manual thermostats on the coffee brewers. Finally McDonald's consciously made no serious effort to warn its consumers."

However, Judge Scott reduced the punitive damages to three times compensatory damages.

The system worked because the initial punitive award brought public attention to this issue.

If my mother did not want to accept the reduced award, she was given the option of retrying the case. She chose a confidential settlement, details of which we are not privileged to know.

What did McDonald's do with the money it probably did not have to pay to my mother? Did it spend it as a responsible corporation should, in finding ways to make its product safe?

McDonald's has spent money on an advertising campaign to make my mother look foolish and say she didn't take responsi-

bility for her actions.

Whereas McDonald's still is not taking responsibility for its actions, Stella Liebeck did. She tried to help future McDonald's customers from old to young be safe.

Did you know the Consumer Product Safety Commission in 1977 advised Americans to turn down our water heaters to 135 degrees to reduce the 200 U.S. child fatalities per year due to scalding? The Shriner's Burn Center in 1994 warned all restaurants to stop serving hot drinks above 135 degrees.

Please understand that the system worked as it was supposed to. The judge currently has the capability to reduce excessive judgments, if he so deems. It is so obvious that lawsuits like this bring attention to dangerous defective products.

Because the government does not wish to regulate the sale of all products, is it appropriate to remove any redress from those who would be injured by corporations that knowingly and callously sell defective products?

[Judy Allen is the daughter of Stella Liebeck, the woman who won a lawsuit against McDonald's for selling coffee that caused her serious burns.]

Alaska Legislative Digest

An Inside View of Alaska Policy

PUBLISHER: Mike Bradner

Business Office: 349-7711
3037 South Circle
Anchorage, AK 99507
Fax: (907) 522-1761

April 24, 1995
No. 12/95

Governor moves his priority bill half way:

House passes oil royalty break!

The House last week, after prolonged debate, passed CSHB-207, legislation that will allow the Commissioner of Natural Resources to adjust the state royalty rates on new fields determined to be marginal and older fields that have become marginal or shut-in. Most such fields would also come under the state's economic limit factor applied to severance taxes on small oil fields and wells. This would mean most fields qualifying for royalty reduction would also pay no severance taxes. In terms of imposed state cost, this would mean most state revenue burden would be substantially lifted.

The heavily amended version of the bill passed the House April 18, but reports are the Senate is likely to delay action final until the last days of the session (and maybe final hours), using the bill as trading stock with the House and Gov. Knowles. The bill is a priority for both House Republicans and the Knowles Administration.

The Senate may use the bill to exact commitments for their priorities. However, Senate Resources chairman Sen. Loren Leman is committed to prompt action, scheduling the bill for almost immediate hearing (Saturday, April 22)

Continued page 8

The tort reform bill back to House floor, and is now expected to pass

The tort reform bill was scheduled back on the House floor Monday, April 23, and this time the bill is expected to pass. CSHB-158 ran into trouble on the House floor March 28th, and was pulled back off the floor. The bill is slated for floor action Monday, April 24th, with backers saying they now have the votes. The House bill seeks to put in place a two-tier system for economic and non-economic damages, capped at \$300,000 and \$500,000. Punitive damages are left open ended, but with half of punitive awards accruing to the general fund. The logic regarding punitive damages is that the punitive award is a penalty, and is awarded without regard to personal loss by the plaintiff. Advocates claim that the penalty should not act as a magnet for plaintiff lawyers to pursue litigation for monetary gain. House backers also say they have the needed votes in the Senate, and say that the bill will emerge from Sen. Robin Taylor's Judiciary Committee, a critic of the tort bill.

Inside this week:

SB-16: University lands bill
alive in the House Page 8

Senate budget Page 3

Looking for construction work?
Watch University AHEC bills Page 3

I wonder WHO said THAT?

... Schools/ Local Gov't ...

School funding remains unclear ?

Both Houses have passed what might be called "half funding," leaving out education. House Chair Mark Hanley is trying to sell two years of "flat-funding" for schools, forcing schools to eat enrollment growth. We are told right now the odds are about 50-50 between flat funding, and funding enrollment growth.

The Tenure etc. bills: The House bill (HB-217) has moved out of Judiciary to House Labor and Commerce, while the Senate's SB-132, will be back before Senate Finance this week.

****See our "local supplement" for the inside on tenure bills and school funding**

Rural/nonprofit insurance pools: This bill (HB-223) is apparently dead in House Community and Regional Affairs where it went through a series of hearings. The expectation was many of the rural/nonprofit pools would join the larger municipal league pool. The bill was opposed by the State Division of Insurance, which questioned the whether such organizations had the fiscal depth to pay claims. The Senate version of the bill (SB-104) is "on hold" in Senate Labor and Commerce.

As expected: Shared revenue cuts 5% to 10%

As expected, reductions for the state's revenue it shares with local government in two programs, municipal assistance and revenue sharing, is now firmly framed between the House and Senate cuts. The Senate proposes a 5% cut from FY-95 (current), the House a 10% cut.

It should be noted that very small communities qualifying for the \$25,000 minimum under "revenue sharing" will not be reduced. Their allocation is fixed in statute at \$25,000. Under municipal assistance major commercial communities, such as Fairbanks, Anchorage, and a few others, also have a floor not subject to reduction. This amount relates to receipts major commercial communities formerly received as a share of the old gross business tax. This tax was repealed, and its local revenue contribution replaced, when the municipal assistance program was enacted shortly after beginning pipeline oil flow.

HB-185: Senior/local tax exemption:

This bill is in House Finance and is expected to move on to the floor. Basically the problem is that the exemption program is a mandate imposed on local governments requiring them to give up tax base, i.e., granting tax exemptions to senior citizens. HB-185 The bill reduces the mandatory exemption from \$150,000 to \$75,000. The average value, or exemption currently is roughly \$87,300.

Flat tax on brink of passage: HB-86 is in Senate Finance one step short of the Senate floor and passage. This bill allows municipalities to apply some kind of flat tax to various classes of personal property (wing span, boat length, etc.), instead of trying to establish actual value. *Note: Finance referral waived 4/20. HB-86 now in Senate Rules.*

Motor vehicle local taxes: HB-272 attempts to shift more flexible taxation of motor vehicles to local initiative. Basically the tax is local, but the most efficient place to collect the tax is at the point of vehicle registration, a state function. The rates are fixed in statute, subject to change from time to time. *Now in House Finance committee, the concept is resisted by commercial transport interests who fear higher classes and rates for their vehicles.*

HB-122: Sharing marine fuel taxes: Now in House Finance, this bill could find a future --perhaps next year. The idea is to relate shared marine fuel taxes to the need to maintain local harbor facilities that must support watercraft.

HB-28: School weapons possession bill: This bill has passed the House has a single Senate committee referral --Judiciary. This bill makes state law conform to federal requirements regarding possession of weapons on, or near schools, and at school events.

HB-215: Grounds for school suspension: This bill expands grounds for suspension when a student is a threat to the welfare, safety and morals of other pupils. The bill would add suspension due to threat to a threat to persons employed or volunteering at school.

The bill passed the House on a 37 to 0 vote, and as we went to passed the Senate 19 to 0.

Note: Many bills are now being "short referred" in each House, meaning sent to only one committee, as the session nears its finale.

Alaskans For Liability Reform

MEMO

To: All House Representatives
From: Alaskans for Liability Reform
Date: April 6, 1995
Subject: HB 158

Attached is a response form Norcal Mutual Insurance Correcting the Information provided by the Division of Insurance per a distribution from Senator Robin Taylor, dated March 22, 1995.

Our question is, Do you support the public or the Plaintiff Attorney Lobby?



Alaska Office

4000 Old Seward Highway, Suite 203
Anchorage, Alaska 99503-6068(907) 563-3414
(907) 563-7801 FACSIMILE

April 5, 1995

Dept. of Commerce & Economic Development
Division of Insurance
P.O. Box 110805
Juneau, AK 99811-0805

ATTN: Marianne K. Burke, Director

RE: NORCAL v MICA Rate Differences

Dear Director Burke:

I received a copy of your March 24, 1995 letter to Senator Robin Taylor in which you state that since 1990 there has been an approximate 60% rate decrease for physicians/surgeons coverage in the MICA/NORCAL rate configuration. You also indicated an approximate 15% rate decrease in hospital rates.

The purpose of this letter is to point out that your comments are inaccurate regarding the percentages of reduction in physician's premiums but I can certainly understand and explain how the erroneous conclusions were reached.

What has not been taken into account is the Rate Class changes that NORCAL instituted upon its assumption of MICA's assets and liabilities in January 1991.

I am enclosing a copy of MICA's 1990 rate card which reflects Rate Classes in effect at that time and also NORCAL's 1995 Rate Card providing its Rate Classes as well. You will note that there is a considerable difference between the two which is even more clearly delineated in the enclosed Rate Class Comparison Chart (see Exhibit A).

Let me give you a very simple example of how your letter and rate comparison in particular is extremely misleading. Your letter to Senator Taylor indicates Emergency Room Practice physicians are Class 5. Under NORCAL's current Rate Class, Emergency Department Physicians are indeed Class 5 but under MICA's Rate Class system they were Class 2-A. Thus, to legitimately compare 1990 to 1995 rates, you must compare premium for the current Class 5 with MICA's 1990 Class 2-A. Your comparison actually reflects the difference (under the Class 5 category)

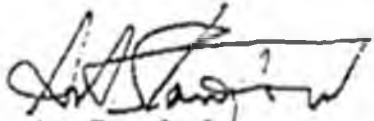
between NORCAL's current Class 5 (the middle of 11 Rating Classes) and MICA's Class 5 which was the most costly Rate Class reserved for such high risk specialties as neurosurgery.

When you make the comparison between the correct rates (see Exhibit B) at the \$1M/\$2M limit of liability for Emergency Department Physicians, you will note that there was actually only an 18% reduction (\$25,537.00 now as compared to \$31,020.00 in 1990) rather than the 74% decrease as indicated on your chart. Indeed, when comparing rate differences for the 5 classes you have outline in your letter, I arrive at an average reduction from 1990 to 1995 of 14.4%. You can easily calculate other specialty reductions by utilizing the premium schedules I am enclosing for years 1990 and 1995 (Exhibits C and D). I'm sure you'll find absolutely no support for concluding rates have decreased by 60% and more likely in the range of 15%

It should also be noted that NORCAL's ability to institute overall rate decreases is a reflection of its capacity and economy of size which allows for a much greater spread of risk and a lower administrative charge. Whereas MICA covered only a few hundred physicians, NORCAL insures over 10,000 and MICA's written premium of approximately \$5M can be compared to NORCAL's of approximately \$100M.

I would be more than happy to discuss these rates with you if you have any additional questions. We would very much appreciate a letter from you after you have had a chance to review the enclosed material regarding the relative change between MICA's 1990 rates and NORCAL's 1995 rates.

Very truly yours,



Art Stanford
Underwriting Manager

Enclosures

CC: Senator Robin L. Taylor
Representative Brian Porter
Roger Holmes, Esq.

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE

P.O. BOX 110805
JUNEAU, ALASKA 99811-0805
PHONE (907) 465-2515

March 24, 1995

The Honorable Robin L. Taylor
Alaska State Senate
State Capitol
Juneau, AK 99801-1182

Dear Senator Taylor:

As you requested March 22, 1995, we have gathered information regarding the relationship between Medical Indemnity Corporation of Alaska (MICA) and NORCAL Mutual Insurance Company medical malpractice rates.

We have compared two limits of liability, \$500,000 per accident/\$1,000,000 aggregate limit (500/1M) and \$1 million per accident/\$2,000,000 aggregate limit (1M/2M), for physician/surgeon rates and hospital rates. The physician/surgeon rates have also been compared by physician classification. NORCAL has revised some of the class definitions by moving some specialties to lower classifications and by increasing the number of classes since 1990. The following list gives definitions for the classes that are common to both MICA and NORCAL.

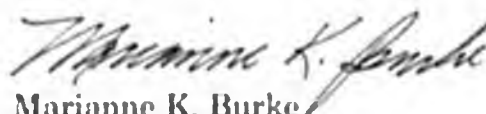
- Class 1 Pathology, Psychiatry
- Class 2 Internal Medicine-Except Left Hart Cath, Neurology, Dermatology
- Class 3 Ophthalmology
- Class 4 Neonatology
- Class 5 Emergency Room Practice, Therapeutic Radiology

The average change for physician/surgeon rates is a decrease of approximately 60 percent, while the hospital average change is a decrease of approximately 15 percent. The mature claims-made premiums for the two limits of liability for each physician/surgeon class, along with the percentage change by class, are given on the attached exhibit. The hospital mature claims-made premiums for the two limits of liability and the corresponding percent change are also on the attached exhibit.

You also requested information regarding the Alaska Municipal League's Joint Insurance Arrangement (JIA) Pool Surplus. The division has no oversight authority of the JIA and does not receive any information regarding the entity. They report directly to the Legislature.

Please let me know if we can be of any further assistance.

Sincerely,


Marianne K. Burke
Director

MKB/cw622.ins
032495b

Physician/Surgeon

Class	500/1M			1M/2M		
	1995	1990	Percent Change	1995	1990	Percent Change
	NORCAL Rate	MICA Rate		NORCAL Rate	MICA Rate	
1	5696	9970	-43%	7396	13103	-44%
2	8807	16116	-45%	11640	21464	-46%
3	11478	30162	-62%	15284	40576	-62%
4	12851	39582	-68%	17157	53393	-68%
5	18995	71433	-73%	25539	96729	-74%

Acute Care Hospitals

Mature Premium

Limit of Liability	1995	1990	Percent Change
	NORCAL Rate	MICA Rate	
500/1M	4376	5130	-15%
1M/2M	6310	7551	-16%

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF COMMERCE AND
ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE

P.O. BOX 110805
JUNEAU, ALASKA 99811-0805
PHONE (907) 465-2515

April 10, 1995

RECEIVED APR 12 1995

Mr. Art Stanford
Underwriting Manager
NORCAL Mutual Insurance Company
4000 Old Seward Highway, Suite 203
Anchorage, AK 99503-6068

Dear Mr. Stanford:

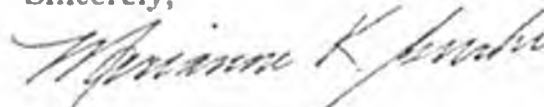
Re: *NORCAL vs. MICA Rates*

Thank you for your letter of April 5, 1995, clarifying the rate class changes that were instituted by NORCAL after assumption of MICA's assets and liabilities.

The rate comparisons made in the letter to Senator Taylor were based upon the information that was available to us from the archived MICA files. Your information appears to be more complete than the information that we were able to find regarding the rate class definitions.

With your additional information, we concur with your conclusion that the rate changes for physicians and surgeons is approximately a 15% decrease.

Sincerely,



Marianne K. Burke
Director

MKB/go816.ins

041095a

cc: Senator Robin Taylor

Representative Brian Porter

Roger Holmes, Esq.

01/04/95 13:17 0907 563 FAX 1

NORCAL MUTUAL IS-

Q (K12) LVL



NORCAL Mutual Insurance Company
Alaska Office

4000 Old Seward Highway, Suite 203
Anchorage, Alaska 99503
Fax: (907) 562-7001
(907) 563-3414

FAX

Page 41 of 1 pages.

If you do not receive all of the pages,
please call (907) 563-3414 as soon
as possible.

TO: David McGuire, M.D. FAX #(907) 5638824:
ATTN: Cynthia DATE: 4/4/95
FROM: Art Stanford
RE: Rate Comparisons: Alaska versus California

We have two different rates in California (northern and southern counties) with the southern area being the higher premium. I will only give you the southern rates. All of the figures will be at the \$1M/\$3M limits of liability and at the 5th or mature year of the 5 year claims-made cycle.

OB/GYN \$38892. (Calif.) - \$64510. (Ak.). Orthopedic Surgery \$31816. (Calif.) and \$556705. (Ak.). Family Practice (no surgery-no O.B.) \$7012. (Calif.) and \$11438. (Ak.).

As we have said many times before, we believe California's rates are a direct reflection of its tort reform legislation known as the Medical Indemnity Compensation Reform Act (MICRA).

Note: Please number each page to be transmitted, starting with this cover sheet. This page will be retained as a corporate tax record.

This facsimile transmission is intended for the use of the individual(s) or entity to which it is addressed, and may contain information that is privileged, confidential or protected from disclosure under applicable law. If the recipient of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you received this communication in error, please notify us immediately by telephone (collect, if necessary) and return the original document to us at the above address via the U.S. Postal Service. Thank you.

*Ketchikan
Daily News
April 6, 1995*



"I'd give it all up to get these legs back"

On November 2, 1989, Don Murray became a paraplegic due to unsafe work conditions. Don was compensated for his injuries, but right now there is a bill in the Alaska

Legislature that would allow wrongdoers to avoid compensating victims.

Why are legislators even considering changes that would favor insurance companies over Alaskan victims? Do they believe that Alaskans get seriously injured just to get a settlement?

This legislation is bad for Alaskans.

Call Representative Jerry Mackie,
today, at
1-907-465-4925.

**Ask him to
Vote NO on
HB158**

4

DAVID A. McGUIRE, M.D.

Orthopedic Surgery

DISTRICT OF THE AMERICAN BOARD
OF ORTHOPAEDIC SURGERY

4040 LAUREL STREET

SUITE 202

ANCHORAGE, ALASKA 99508

PHONE 907-862-4142

April 7, 1995

Dear Senator:

As you know, the issue of Tort Reform may be presented to you.

Please note the FAX from Norcal. While it is true the insurance costs have decreased, these are nevertheless quite high, higher than they need to be.

If you want to lower the costs of health care, one place to start is with the cost of insurance. These costs are a direct reflection of our Tort laws.

Please support HB-158.

Sincerely


David A. McGuire, M.D.

cc:Mail for: Terry Otness

Subject: h229.ih.FTP

From: sled@sleaska.edu (SLED Login) at CC2MHS1 2/27/95 11:46 AM

To: Terry Otness at JNU_CAPITOL

FILE h229.ih

104th CONGRESS

1st Session

To impose certain requirements on medical malpractice liability claims.

IN THE HOUSE OF REPRESENTATIVES

January 4, 1995

Mr. Dornan introduced the following bill; which was referred to the Committee on the Judiciary and, in addition, to the Committee on Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To impose certain requirements on medical malpractice liability claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Medical Injury Compensation Reform Act of 1995'.

SEC. 2. GENERAL PROVISIONS.

(a) Congressional Findings:

(1) Effect on interstate commerce: The Congress finds that the health care and insurance industries are industries affecting interstate commerce and the medical malpractice litigation systems existing throughout the United States affect interstate commerce by contributing to the high cost of health care and premiums for malpractice insurance purchased by health care providers.

(2) Effect on federal spending: The Congress finds that the medical malpractice litigation systems existing throughout the United States have a significant effect on the amount, distribution, and use of Federal funds because of--

(A) the large number of individuals who receive health care benefits under programs operated or financed by the Federal Government;

(B) the large number of individuals who benefit because of the exclusion from Federal taxes of the amounts spent by their employers to provide them with health insurance benefits;

(C) the large number of health care providers and health care professionals who provide items or services for which the Federal Government makes payments; and

(D) the large number of such providers and professionals who have received direct or indirect financial assistance from the Federal Government because of their status as such professionals or providers.

(b) Applicability: This Act shall apply with respect to any medical malpractice liability claim and to any medical malpractice liability action brought in any State or Federal court, except that this Act shall not apply to--

- (1) a claim or action for damages arising from a vaccine-related injury or death to the extent that title XXI of the Public Health Service Act applies to the claim or action; or
- (2) a claim or action in which the claimant's sole allegation is an allegation of an injury arising from the use of a medical product.

(c) Preemption of State Law: Subject to section 10, this Act supersedes State law only to the extent that State law differs from any provision of law established by or under this Act. Any issue that is not governed by any provision of law established by or under this Act shall be governed by otherwise applicable State or Federal law.

(d) Federal Court Jurisdiction Not Established on Federal Question Grounds: Nothing in this Act shall be construed to establish any jurisdiction in the district courts of the United States over medical malpractice liability actions on the basis of section 1331 or 1337 of title 28, United States Code.

SEC. 3. DEFINITIONS.

As used in this Act:

(1) Claimant: The term 'claimant' means any person who alleges a medical malpractice liability claim or, in the case of an individual who is deceased, incompetent, or a minor, the person on whose behalf such a claim is alleged.

(2) Economic damages: The term 'economic damages' means damages paid to compensate an individual for losses for hospital and other medical expenses, lost wages, lost employment, and other pecuniary losses.

(3) Health care professional: The term 'health care professional' means any individual who provides health care services in a State and who is required by State law or regulation to be licensed or certified by the State to provide such services in the State.

(4) Health care provider: The term 'health care provider' means any organization or institution that is engaged in the delivery of health care services in a State and that is required by State law or regulation to be licensed or certified by the State to engage in the delivery of such services in the State.

(5) Injury: The term 'injury' means any illness, disease, or other harm that is the subject of a medical malpractice liability action or claim.

(6) Medical malpractice liability action: The term 'medical malpractice liability action' means a civil action (other than an action in which the claimant's sole allegation is an allegation of an intentional tort) brought in a State or Federal court against a health care provider or health care professional (regardless of the theory of liability on which the action is based) in which the claimant alleges a medical malpractice liability claim.

(7) Medical malpractice liability claim: The term 'medical malpractice liability claim' means a claim in which the claimant alleges that injury was caused by the provision of (or the failure to provide) health care services.

(8) Medical product: The term 'medical product' means a device (as defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act) or a drug (as defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act).

(9) Noneconomic damages: The term 'noneconomic damages' means damages paid to compensate an individual for losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary losses, but

does not include punitive damages.

(10) Secretary: The term 'Secretary' means the Secretary of Health and Human Services.

(11) State: The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

SEC. 4. EFFECTIVE DATE.

(a) In General: Except as provided in subsection (b) and section 11, this Act shall apply with respect to claims accruing or actions brought on or after the expiration of the 3-year period that begins on the date of the enactment of this Act.

(b) Exception for States Requesting Earlier Implementation of Reforms:

(1) Application: A State may submit an application to the Secretary requesting the early implementation of this Act with respect to claims or actions brought in the State.

(2) Decision by secretary: The Secretary shall issue a response to a State's application under paragraph (1) not later than 90 days after receiving the application. If the Secretary determines that the State meets the requirements of this Act at the time of submitting its application, the Secretary shall approve the State's application, and this Act shall apply with respect to actions brought in the State on or after the expiration of the 90-day period that begins on the date the Secretary issues the response. If the Secretary denies the State's application, the Secretary shall provide the State with a written explanation of the grounds for the decision.

SEC. 5. STATUTE OF LIMITATIONS.

(a) In General: No medical malpractice liability claim may be brought after the expiration of the 2-year period that begins on the date the alleged injury that is the subject of the action should reasonably have been discovered, but in no event after the expiration of the 4-year period that begins on the date the alleged injury occurred.

(b) Exception for Minors: In the case of an alleged injury suffered by a minor who has not attained 6 years of age, no medical malpractice liability claim may be brought after the expiration of the 2-year period that begins on the date the alleged injury that is the subject of the action should reasonably have been discovered, but in no event after the date on which the minor attains 10 years of age.

SEC. 6. ATTORNEYS' FEES.

(a) Limitation on Contingency Fees: An attorney shall not contract for or collect a contingency fee for representing a claimant in a medical malpractice liability action in excess of the following:

(1) 40 percent of the first \$50,000 (or portion thereof) of the amount recovered by the claimant.

(2) 33 1/3 percent of the next \$50,000 (or portion thereof) of the amount recovered by the claimant.

(3) 25 percent of the next \$500,000 (or portion thereof) of the amount recovered by the claimant.

(4) 15 percent of any amounts recovered by the claimant in excess of \$600,000.

This subsection applies whether the recovery is by settlement, arbitration, or judgment.

(b) Calculation of Periodic Payments: If periodic payments are awarded to the claimant pursuant to section 7(b), the court shall place a total value on these payments based upon the projected life expectancy of the claimant and include this amount in computing the total award from which attorneys' fees are calculated under subsection (a).

(c) Effect of Failure To Comply: Failure to comply with this section by an attorney at law shall be grounds for professional discipline by the appropriate State agency responsible for the conduct of disciplinary actions against attorneys-at-law.

(d) Definitions: For purposes of this section--

(1) the term 'contingency fee' means any fee for professional legal services which is in whole or in part contingent upon the recovery of any amount of damages, whether through judgment or settlement; and

(2) the term 'recovered' means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim, except that costs of medical care incurred by the claimant and the attorney's office overhead costs or charges shall not be deductible disbursements under this paragraph.

SEC. 7. CALCULATION AND PAYMENT OF DAMAGES.

(a) Limitation on Noneconomic Damages: The total amount of noneconomic damages that may be awarded to a claimant for losses resulting from the injury which is the subject of a medical malpractice liability action may not exceed \$250,000, regardless of the number of parties against whom the action is brought or the number of actions brought with respect to the injury.

(b) Periodic Payments for Future Losses: If more than \$50,000 in damages for expenses to be incurred in the future is awarded to the claimant in a medical malpractice liability action, the court shall, at the request of either party, enter a judgment ordering such damages to be paid on a periodic basis determined appropriate by the court (based upon projections of when such expenses are likely to be incurred).

(c) Mandator Offsets for Damages Paid by a Collateral Source: The total amount of damages received by a claimant in a medical malpractice liability action shall be reduced by any other payment that has been or will be made to the individual to compensate the claimant for the injury that was the subject of the action, including payment under--

- (1) Federal or State disability or sickness programs;
- (2) Federal, State, or private health insurance programs;
- (3) private disability insurance programs;
- (4) employer wage continuation programs; and
- (5) any other source of payment intended to compensate the claimant for such injury.

SEC. 8. NOTICE OF ACTION.

(a) Notice Requirement:

(1) In general: No medical malpractice liability action may be commenced unless the defendant has been given at least 90 days notice of the intention to commence the action.

(2) Contents of notice: The notice under paragraph (1) shall include the legal basis of the medical malpractice liability claim on which the action is based and the type of loss sustained, including the specific nature of the injuries suffered.

(b) Effect on Statute of Limitations: If the notice under paragraph (1) is served within 90 days before the expiration of the statute of limitations for filing the medical malpractice liability action, the time for commencing the action shall extend for 90 days after the notice under paragraph (1) is served.

(c) Effect of Failure To Comply: Failure to comply with this section shall not invalidate any court proceedings in the medical malpractice liability action involved, and shall not affect the jurisdiction of the court to render a judgment in the action, but a failure to comply with this section by an attorney at law shall be grounds for professional discipline by the appropriate State agency

responsible for the conduct of disciplinary actions against attorneys-at-law.

SEC. 9. INJUNCTIVE RELIEF.

Whenever any person has engaged or is about to engage in any conduct in violation of this Act, the appropriate court may, upon application of an interested party, issue an injunction or other appropriate order restraining such conduct.

SEC. 10. PREEMPTION.

(a) In General: The preceding provisions of this Act supersede any State law only to the extent that State law--

- (1) permits the recovery of a greater amount of damages by claimant;
- (2) permits the collection of a greater amount of attorneys' fees by a claimant's attorney; or
- (3) establishes a longer period during which a medical malpractice liability claim may be initiated.

(b) Effect on Sovereign Immunity and Choice of Law or Venue: Nothing in subsection (a) shall be construed to--

- (1) waive or affect any defense of sovereign immunity asserted by any State under any provision of law;
- (2) waive or affect any defense of sovereign immunity asserted by the United States;
- (3) affect the applicability of any provision of the Foreign Sovereign Immunities Act of 1976;
- (4) preempt State choice-of-law rules with respect to claims brought by a foreign country or a citizen of a foreign country; or
- (5) affect the right of any court to transfer venue or to apply the law of a foreign country or to dismiss a claim of a foreign country or of a citizen of a foreign nation on the ground of inconvenient forum.

SEC. 11. PERMITTING STATE PROFESSIONAL SOCIETIES TO PARTICIPATE IN DISCIPLINARY ACTIVITIES.

(a) Role of Professional Societies: Notwithstanding any other provision of State or Federal law, a State agency responsible for the conduct of disciplinary actions for a type of health care practitioner may enter into agreements with State or county professional societies of such type of health care practitioner to permit such societies to participate in the licensing of such health care practitioner, and to review any health care malpractice action, health care malpractice claim or allegation, or other information concerning the practice patterns of any such health care practitioner. Any such agreement shall comply with subsection (b).

(b) Requirements of Agreements: Any agreement entered into under subsection (a) for licensing activities or the review of any health care malpractice action, health care malpractice claim or allegation, or other information concerning the practice patterns of a health care practitioner shall provide that--

- (1) the health care professional society conducts such activities or review as expeditiously as possible;
- (2) after the completion of such review, such society shall report its findings to the State agency with which it entered into such agreement;
- (3) the conduct of such activities or review and the reporting of such findings be conducted in a manner which assures the preservation of confidentiality of health care information and of the review process; and
- (4) no individual affiliated with such society is liable for any damages or injury directly caused by the individual's actions in conducting such activities or review.

(c) Agreements Not Mandatory: Nothing in this section may be

construed to require a State to enter into agreements with societies described in subsection (a) to conduct the activities described in such subsection.

(d) Effective Date: This section shall take effect 2 years after the date of the enactment of this Act.

cc:Mail for: Terry Otness

Subject: s243.is.FTP

From: sled@sled.alaska.edu (SLED Login) at CC2MHS1 2/27/95 12:07 PM

To: Terry Otness at JNU_CAPITOL

FILE s243.is

S 243 IS

104th CONGRESS

1st Session

To provide greater access to civil justice by reducing costs and delay, and for other purposes.

IN THE SENATE OF THE UNITED STATES

January 19 (legislative day, January 10), 1995

Mr. Grassley introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide greater access to civil justice by reducing costs and delay, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Civil Justice Reform Act of 1995'.

SEC. 2. DIVERSITY OF CITIZENSHIP JURISDICTION; AWARD OF ATTORNEYS' FEES TO PREVAILING PARTY.

(a) Award of Fees: Section 1332 of title 28, United States Code, is amended by inserting after subsection (e) the following new subsection:

(f)(1) The prevailing party in an action under this section shall be entitled to attorneys' fees only to the extent that such party prevails on any position or claim advanced during the action. Attorneys' fees under this paragraph shall be paid by the nonprevailing party but shall not exceed the amount of the attorneys' fees of the nonprevailing party with regard to such position or claim. If the nonprevailing party receives services under a contingent fee agreement, the amount of attorneys' fees under this paragraph shall not exceed the reasonable value of those services.

(2) In order to receive attorneys' fees under paragraph (1), counsel of record in any actions under this section shall maintain accurate, complete records of hours worked on the matter regardless of the fee arrangement with his or her client.

(3) The court may, in its discretion, limit the fees recovered under paragraph (1) to the extent that the court finds special circumstances that make payment of such fees unjust.

(4) This subsection shall not apply to any action removed from a State court under section 1441 of this title, or to any action in which the United States, any State, or any agency, officer, or employee of the United States or any State is a party.

(5) As used in this subsection, the term 'prevailing party' means a party to an action who obtains a favorable final judgment (other than by settlement), exclusive of interest, on all or a portion of the claims asserted in the action.

(b) Study and Report: (1) The Director of the Administrative Office of the United States Courts shall conduct a study regarding the effect of the requirements of subsection (f) of section 1332 of title 28, United States Code, as added by subsection (a) of this section, on the caseload of actions brought under such section.

which study shall include--

(A) data on the number of actions, within each judicial district, in which the nonprevailing party was required to pay the attorneys' fees of the prevailing party; and

(B) an assessment of the deterrent effect of the requirements on frivolous or meritless actions.

(2) No later than 4 years after the date of enactment of this Act, the Director of the Administrative Office of the United States Courts shall submit a report to the appropriate committees of Congress containing--

(A) the results of the study described in paragraph (1); and

(B) recommendations regarding whether the requirements should be continued or applied with respect to additional actions.

(c) Repeal: No later than 5 years after the date of enactment of this Act, this section and the amendment made by this section shall be repealed.

SEC. 3. OFFER OF JUDGMENT.

(a) In General: Part V of title 28, United States Code, is amended by inserting after chapter 113 the following new chapter:

CHAPTER 114--PRETRIAL PROVISIONS

Sec.

1721. Offer of judgment.

Sec. 1721. Offer of judgment

(a) (1) In any civil action filed in a district court, any party may serve upon any adverse party a written offer to allow judgment to be entered for the money or property specified in the offer.

(2) If within 14 days after service of the offer, the adverse party serves written notice that the offer is accepted, either party may file the offer and notice of acceptance and the clerk shall enter judgment.

(3) An offer not accepted within a 14-day period shall be deemed withdrawn and evidence thereof is not admissible, except in a proceeding to determine reasonable attorney fees.

(4) If the final judgment obtained by the offeree is not more favorable than the offer made under paragraph (1) which was not accepted by the offeree, the offeree shall pay the offeror's reasonable attorney fees incurred after the expiration of the time for accepting the offer, to the extent necessary to make the offeror whole.

(5) In no case shall an award of attorney fees under this section exceed the amount of the judgment obtained. The court may reduce the award of costs and attorney fees to avoid the imposition of undue hardship on a party.

(6) The fact that an offer is made under this section shall not preclude a subsequent offer.

(7) (A) Subject to the provisions of subparagraph (B), when the liability of 1 party has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of judgment, which shall have the same effect as an offer made before trial.

(B) The court may shorten the period of time an offeree may have to accept an offer under subparagraph (A), but in no case shall such period be less than 7 days.

(b) A party making an offer shall not be deprived of the benefits of an offer it makes by an adverse party's subsequent offer, unless the subsequent offer is more favorable than the judgment obtained.

(c) If the judgment obtained includes nonmonetary relief, a determination that it is more favorable to the offeree than was the offer shall be made only when the terms of the offer included all such nonmonetary relief.

(d) This section shall not apply to class or derivative actions under rules 23, 23.1 and 23.2 of the Federal Rules of Civil Procedure.

(e) (1) Except as provided under paragraph (2), the provisions of this section shall not be construed to prohibit an award or reduce the amount of an award a party may receive under a statute which provides for the payment of attorney's fees by another party.

(2) The amount a party may receive under this section may be set off against the amount of an award made under a statute described in paragraph (1).'

(b) Technical and Conforming Amendment: The table of chapters for part IV of title 28, United States Code, is amended by inserting after the item relating to chapter 113 the following:

SEC. 4. PRIOR NOTICE AS A PREREQUISITE OF FILING A CIVIL ACTION IN THE UNITED STATES DISTRICT COURT.

(a) In General: Chapter 23 of title 28, United States Code, is amended by adding at the end the following:

'Sec. 483. Prior notice of civil action

(a) (1) No less than 30 days before filing a civil action in a court of the United States the claimant intending to file such action shall transmit written notice to any intended defendant of the specific claims involved, including the amount of actual damages and expenses incurred and expected to be incurred. The claimant shall transmit such notice to any intended defendant at an address reasonably expected to provide actual notice.

(2) For purposes of this section, the term 'transmit' means to mail by first class-mail, postage prepaid, or contract for delivery by any company which physically delivers correspondence as a commercial service to the public in its regular course of business.

(3) The claimant shall at the time of filing a civil action, file in the court a certificate of service evidencing compliance with this subsection.

(b) If the applicable statute of limitations for such action would expire during the period of notice required by subsection (a), the statute of limitations shall expire on the thirtieth day after the date on which written notice is transmitted to the intended defendant or defendants under subsection (a). The parties may by written agreement extend that 30-day period for an additional period of not to exceed 20 days.

(c) The requirements of this section shall not apply--

(1) in any action to seize or forfeit assets subject to forfeiture or in any bankruptcy, insolvency, receivership, conservatorship, or liquidation proceeding;

(2) if the assets that are the subject of the action or would satisfy a judgment are subject to flight, dissipation, or destruction, or if the defendant is subject to flight;

(3) if a written notice prior to filing an action is otherwise required by law, or the claimant has made a prior attempt in writing to settle the claim with the defendant;

(4) in proceedings to enforce a civil investigative demand or an administrative summons;

(5) in any action to foreclose a lien; or

(6) in any action pertaining to a temporary restraining order, preliminary injunctive relief, or the fraudulent conveyance of property, or in any other type of action involving exigent circumstances that compel immediate resort to the courts.

(d) If the district court finds that the requirements of subsection (a) have not been met by the claimant, and such defect is asserted by the defendant within 60 days after service of the summons or complaint upon such defendant, the claim shall be dismissed without prejudice and the costs of such action, including

attorneys' fees, shall be imposed upon the claimant. Whenever an action is dismissed under this subsection, the claimant may refile such claim within 60 days after dismissal regardless of any statutory limitations period if--

(1) during the 60 days after dismissal, notice is transmitted under subsection (a); and

(2) the original action was timely filed in accordance with subsection (b).''

(b) Conforming Amendment: The table of sections at the beginning of chapter 23 of title 28, United States Code, is amended by adding at the end the following:

'483. Prior notice of civil action.'.

SEC. 5. CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT.

(a) Exhaustion of Administrative Remedies: Section 7 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e) is amended--

(1) by amending subsection (a) to read as follows:

'(a) In any action brought pursuant to section 1979 of the Revised Statutes of the United States, by any adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall continue such case for a period not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.'; and

(2) in subsection (b)--

(A) by redesignating paragraphs (1) and (2) as paragraphs (2) and (3), respectively; and

(B) by inserting immediately after '(b)' the following:

'(1) Upon the request of a State or local corrections agency, the Attorney General of the United States shall provide the agency with technical advice and assistance in establishing plain, speedy, and effective administrative remedies for inmate grievances.'.

(b) Proceedings in Forma Pauperis: Section 1915(d) of title 28, United States Code, is amended to read as follows:

'(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action fails to state a claim upon which relief can be granted or is frivolous or malicious.'.

(c) Effective Date: The amendments made by subsections (a) and (b) shall take effect on the date of the enactment of this Act.

SEC. 6. EXPERT WITNESSES.

(a) In General: Chapter 119 of title 28, United States Code, is amended by inserting after section 1828 the following new section:

'Sec. 1829. Multiple expert witnesses

'In any civil action filed in a district court, the court shall not permit opinion evidence on the same issue from more than 1 expert witness for each party, except upon a showing of good cause.'.

(b) Technical and Conforming Amendment: The table of sections for chapter 119 of title 28, United States Code, is amended by inserting after the item relating to section 1828 the following new section:

'1829. Multiple expert witnesses.'.

SEC. 7. SEVERABILITY.

If any provision of this Act or the amendments made by this Act or the application of any provision or amendment to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of such provision and amendments to any other person or circumstance shall not be affected by that invalidation.

SEC. 8. EFFECTIVE DATE.

Except as expressly provided otherwise, this Act and the amendments made by this Act shall become effective 90 days after

the date of the enactment of this Act. This Act shall not apply to any action or proceeding commenced before such effective date.

cc:Mail for: Terry Otness

Subject: h93.lh.FTP

From: sled@sled.alaska.edu (SLED Login) at CC2MHS1 2/27/95 11:33 AM

To: Terry Otness at JNU_CAPITOL

FILE h93.lh

104th CONGRESS

1st Session

To provide that the prevailing party in a tort action is entitled to recover attorneys' fees from the nonprevailing party.

IN THE HOUSE OF REPRESENTATIVES

January 4, 1995

Mr. Sensenbrenner introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide that the prevailing party in a tort action is entitled to recover attorneys' fees from the nonprevailing party.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AWARD OF ATTORNEYS' FEES.

The prevailing party in any civil action brought in a State or Federal court for money damages for injury or loss of property or personal injury or death caused by a negligent act or omission shall be entitled to recover from the nonprevailing party a reasonable attorney's fee. If sought by the prevailing party, the court shall award an attorney's fee under this section, whether the prevailing party is a plaintiff or defendant, unless the court finds special circumstances that would render such an award unjust.

SEC. 2. DEFINITION.

For purposes of this Act, the term 'State' includes the District of Columbia.

FILE s11.is

104th CONGRESS

1st Session

To award grants to States to promote the development of alternative dispute resolution systems for medical malpractice claims, to generate knowledge about such systems through expert data gathering and assessment activities, to promote uniformity and to curb excesses in State liability systems through federally-mandated liability reforms, and for other purposes.

IN THE SENATE OF THE UNITED STATES

January 4, 1995

Mr. Kyl introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To award grants to States to promote the development of alternative dispute resolution systems for medical malpractice claims, to generate knowledge about such systems through expert data gathering and assessment activities, to promote uniformity and to curb excesses in State liability systems through federally-mandated liability reforms, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Medical Care Injury Compensation Reform Act of 1995'.

SEC. 2. FINDINGS; PURPOSE.

(a) Findings: Congress finds that--

(1) the health care and insurance industries are industries affecting interstate commerce and the medical malpractice litigation systems existing throughout the United States affect interstate commerce by contributing to the high cost of health care and premiums for malpractice insurance purchased by health care providers;

(2) the Federal Government has a major interest in health care as a direct provider of health care through the Public Health Service, as a source of payment for health care through Medicare, Medicaid, and other programs, and has a demonstrated interest in assessing the quality of care, access to care, and the costs of care through the evaluative activities of several Federal agencies;

(3) there is increasing concern that health care liability claims have significant negative effects on the health care system, including--

(A) increasing costs attributable to defensive medical practices, including the rising cost of medical liability insurance and costs attributable to the inefficiencies in the civil justice system;

(B) adverse effects on the quality of health care through the encouragement of defensive health care practices including unnecessary tests and procedures; and

(C) adverse effects on patient access to care because the fear of liability discourages health care professionals from continuing to practice in high risk specialties and certain geographic regions of the country;

(4) it has been demonstrated that the civil justice system is a costly, inefficient, and inequitable mechanism for resolving claims against health care providers and producers;

(5) a disproportionately large percentage of funds expended to compensate patients who suffer health care injuries is distributed to a few individuals, while others are denied adequate compensation;

(6) an exorbitant portion of awards in medical malpractice actions goes towards paying the transaction costs of the judicial system rather than compensating individuals for health care injuries; and

(7) there is optimism that alternative dispute resolution systems have the potential to significantly improve the adverse effects of the medical liability environment; however, more data and analysis is necessary to fully understand the benefits of various procedural devices.

(b) Purpose: The purposes of this Act are to--

(1) provide incentives to States to develop alternative dispute resolution procedures to attain a more efficient, expeditious, and equitable resolution of health care malpractice disputes;

(2) enhance general knowledge concerning the benefits of different forms of alternative dispute resolution mechanisms; and

(3) establish uniformity and curb excesses in the State-based medical liability systems through federally-mandated reforms.

SEC. 3. DEFINITIONS.

As used in this Act:

(1) Alternative dispute resolution system: The term 'alternative dispute resolution system' means a system that is enacted or adopted by a State to resolve medical malpractice claims or medical product liability claims instead of resorting to a judicial proceeding in a State court.

(2) Claimant: The term 'claimant' means any person who brings a health care liability action and, in the case of an individual who is deceased, incompetent, or a minor, the person on whose behalf such an action is brought.

(3) Clear and convincing evidence: The term 'clear and convincing evidence' is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, except that such measure or degree of proof is more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt.

(4) Economic losses: The term 'economic losses' means losses for hospital and other medical expenses, lost wages, lost employment, and other pecuniary losses.

(5) Health care liability action: The term 'health care liability action' means any civil action brought pursuant to State law in which a plaintiff alleges a medical malpractice claim against a health care provider, health care professional, or medical product producer.

(6) Health care professional: The term 'health care professional' means any individual who provides health care services in a State and who is required by State law or

regulation to be licensed or certified by the State to provide such services in the State.

(7) Health care provider: The term 'health care provider' means any organization or institution that is engaged in the delivery of health care services in a State that is required by State law or regulation to be licensed or certified by the State to engage in the delivery of such services in the State.

(8) Injury: The term 'injury' means any illness, disease, or other harm that is the subject of a medical malpractice claim or a medical product liability claim.

(9) Medical malpractice claim: The term 'medical malpractice claim' means any claim relating to the provision of (or the failure to provide) health care services without regard to the theory of liability asserted, and includes any third-party claim, cross-claim, counterclaim, or contribution claim in a health care liability action.

(10) Medical product: The term 'medical product' means a device (as defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act) or a drug (as defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act).

(11) Medical product liability claim: The term 'medical product liability claim' means any claim in which a claimant alleges an injury arising from or relating to the use of a medical product.

(12) Medical product producer: The term 'medical product producer' means any entity that is the designer, manufacturer, producer, or seller of a medical product that is the subject of a medical product liability claim.

(13) Noneconomic losses: The term 'noneconomic losses' means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary losses.

(14) Secretary: The term 'Secretary' means the Secretary of Health and Human Services.

(15) State: The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam.

TITLE I-GRANTS TO STATES FOR ALTERNATIVE DISPUTE RESOLUTION SYSTEMS

SEC. 101. GRANTS TO STATES.

(a) In General: The Secretary shall make grants to States for the implementation and evaluation of alternative dispute resolution systems.

(b) Eligibility: A State is eligible to receive a grant under this section if the State submits to the Secretary an application at such time, in such form, and containing such information and assurances as the Secretary may require, including--

(1) a description of the alternative dispute resolution system that the State intends to implement with amounts received under the grant;

(2) assurances that the State will comply with all data gathering requirements promulgated by the Secretary under section 102(a), and

(3) any information and assurances necessary to enable the Secretary to determine whether the State's alternative dispute resolution system meets the qualification standards for such systems developed by the Secretary under section 102(a).

(c) Number of Grants:

(1) In general: Except as provided in paragraph (2), the Secretary shall award not less than 10 grants each fiscal year under this section.

(2) Exception: Notwithstanding paragraph (1), the Secretary may award less than 10 grants under this section in a fiscal year if the Secretary determines that there are an inadequate number of applications submitted that meet the eligibility and approval requirements of this section in such fiscal year.

(d) Designation of Model States:

(1) In general: The Secretary shall designate each State receiving a grant under this section as a model alternative dispute resolution State.

(2) Extension of period of grant: Upon application to the Secretary, a State designated under paragraph (1) shall be eligible for a 2-year extension of the grant received under this section.

(3) Dissemination of information to other states: The Secretary shall disseminate information on the alternative dispute resolution systems implemented by the States designated under paragraph (1) to other States, health care professionals, health care providers, and other interested parties.

SEC. 102. ADMINISTRATION.

(a) Standards and Regulations for Alternative Dispute Resolution Grant Program:

(1) In general: In consultation with the Director of the Agency for Health Care Policy and Research, the Secretary shall develop and promulgate standards and regulations necessary to carry out the grant program established under section 101, including--

(A) qualification standards for alternative dispute resolution systems that States must meet in order to receive grants under such section; and

(B) regulations establishing data gathering requirements for States receiving grants under such section.

(2) Criteria for programs: In developing qualification standards for alternative dispute resolution systems under paragraph (1)(A), the Secretary shall take into account the effectiveness of such systems in--

(A) supporting access to health care;

(B) encouraging improvements in the quality of health care;

(C) enhancing and not impairing the physician-patient relationship;

(D) encouraging innovation that leads to an improved level of health care;

(E) compensating for avoidable medical injury due to provider fault and not compensating for injury which is unavoidable by standard medical practice;

(F) resolving claims promptly and in amounts proportional to the injury;

- (G) providing predictable outcomes; and
- (H) operating efficiently in terms of financial costs, professional energies, and governmental processes.

(b) **Technical Assistance:** The Secretary shall provide States with technical assistance to enable States to submit applications for grants under section 101, including information on the establishment and operation of alternative dispute resolution systems.

(c) **Evaluation of Alternative Dispute Resolution Systems:** Not later than 4 years after awarding the first grant to a State under section 101, the Secretary shall prepare and submit to Congress a report describing and evaluating the alternative dispute resolution systems implemented by States with funds provided under such grants, and shall include in the report--

(1) information on--

(A) the effect of such systems on the cost of health care within the State,

(B) the impact of such systems on the access of individuals to health care within the State, and

(C) the effect of such systems on the quality of health care provided within such State; and

(2) an analysis of the feasibility and desirability of establishing a national alternative dispute resolution system.

TITLE II--UNIFORM STANDARDS FOR MALPRACTICE CLAIMS

SEC. 201. APPLICABILITY.

Except as provided in section 209, this title shall apply to any health care liability action brought in a Federal or State court and to any medical malpractice claim or medical product liability claim subject to an alternative dispute resolution system.

SEC. 202. CALCULATION AND PAYMENT OF DAMAGES.

(a) **Periodic Payments for Future Losses:** No person may be required to pay more than \$100,000 in a single payment in damages (whether for economic or noneconomic losses) for expenses to be incurred in the future, but shall be permitted to make such payments on a periodic basis. The periods for such payments shall be determined by the court, based upon projections of when such expenses are likely to be incurred.

(b) **Limitation on Noneconomic Losses:** The total amount of damages that may be awarded to an individual and the family members of such individual for noneconomic losses resulting from an injury which is the subject of an action or claim may not exceed \$250,000, regardless of the number of health care professionals, health care providers, and health care producers against whom the action or claim is brought or the number of actions or claims brought with respect to the injury.

(c) **Mandatory Offsets for Damages Paid by a Collateral Source:**

(1) **In general:** The total amount of damages received by an individual shall be reduced (in accordance with paragraph (2)) by any other payment that has been or will be made to the individual to compensate the individual for the injury that was the subject of the action or claim.

(2) **Amount of reduction:** The amount by which an award of damages to an individual shall be reduced under paragraph (1) shall be--

(A) the total amount of any payments (other than such award) that have been made or that will be made to the individual to compensate the individual for the injury that was the subject of the action or claim; minus

(B) the amount paid by the individual (or by the spouse, parent, or legal guardian of the individual) to secure the payments described in subparagraph (A).

(d) Attorney's Fees: A claimant's attorney's fees may not exceed--

(1) 25 percent of the first \$150,000 of any award or settlement paid to the claimant; or

(2) 15 percent of any additional amounts paid to the claimant

(e) Limitation on Punitive Damages: The total amount of punitive damages that may be assessed with respect to an action or claim may not exceed twice the total amount of the damages awarded to compensate the claimant for losses resulting from the injury which is the subject of the claim or action, regardless of the number of health care professionals, health care providers, and health care producers against whom the action or claim is brought or the number of actions or claims brought with respect to the injury.

SEC. 203. JOINT AND SEVERAL LIABILITY FOR NONECONOMIC LOSSES.

The liability of each defendant for noneconomic losses shall be several only and shall not be joint, and each defendant shall be liable only for the amount of noneconomic losses allocated to the defendant in direct proportion to the defendant's percentage of responsibility (as determined by the trier of fact).

SEC. 204. UNIFORM STATUTE OF LIMITATIONS.

(a) In General: No medical malpractice claim or medical product liability claim may be initiated after the expiration of the 2-year period that begins on the earlier of the date which the alleged injury that is the subject of such action was discovered or the date on which such injury should reasonably have been discovered, but in no event after the expiration of the 4-year period that begins on the date the alleged injury occurred.

(b) Exception for Minors: In the case of an alleged injury suffered by a minor who has not attained 6 years of age, no medical malpractice liability claim or medical product liability claim may be brought after the expiration of the 2-year period that begins on the date the alleged injury that is the subject of the action should reasonably have been discovered, but in no event after the date on which the minor attains 10 years of age.

SEC. 205. SPECIAL PROVISION FOR CERTAIN OBSTETRIC SERVICES.

(a) In General: In the case of a medical malpractice claim or medical product liability claim relating to services provided during labor or the delivery of a baby, if the defendant health care professional did not previously treat the plaintiff for the pregnancy, the trier of fact may not find that the defendant committed malpractice and may not assess damages against the defendant unless the malpractice is proven by clear and convincing evidence.

(b) Applicability to Group Practices or Agreements Among Providers: For purposes of subsection (a), a health care professional shall be considered to have previously treated an individual for a pregnancy if the professional is a member of a group practice whose members previously treated the individual for

the pregnancy or is providing services to the individual during labor or the delivery of a baby pursuant to an agreement with another professional.

SEC. 206. UNIFORM STANDARD FOR DETERMINING NEGLIGENCE.

(a) Standard of Reasonableness: Except as provided in subsection (b), a defendant may not be found to have committed malpractice unless the defendant's conduct at the time of providing the health care services that are the subject of the action was not reasonable.

(b) Actions Brought Under Strict Liability: Subsection (a) shall not apply to any action in which the claimant asserts that the defendant is liable under a theory of strict liability.

SEC. 207. RESTRICTIONS ON PUNITIVE DAMAGES RELATING TO MEDICAL

PRODUCT LIABILITY CLAIMS.

(a) Restrictions for Approved Products or Devices:

(1) In general: Punitive damages otherwise permitted by applicable law shall not be awarded with respect to any medical product liability claim alleged against a medical product producer if--

(A) the drug or device that is the subject of such claim--

(i) was subject to approval under section 505 or premarket approval under section 515 of the Federal Food, Drug, and Cosmetic Act by the Food and Drug Administration with respect to--

(I) the safety of the formulation or performance of the aspect of the drug or device; or

(II) the adequacy of the packaging or labeling of the drug or device; and

(ii) was approved by the Food and Drug Administration; or

(B) the drug or device is generally recognized as safe and effective pursuant to conditions established by the Food and Drug Administration and applicable regulations, including packaging and labeling regulations.

(2) Exception in case of withheld information, misrepresentation, or illegal payment: The provisions of paragraph (1) shall not apply if it is determined on the basis of clear and convincing evidence that the medical product producer--

(A) withheld from or misrepresented to the Food and Drug Administration information concerning such drug or device that is required to be submitted under the Federal Food, Drug, and Cosmetic Act or section 352 of the Public Health Service Act that is material and relevant to the action; or

(B) made an illegal payment to an official of the Food and Drug Administration for the purpose of securing approval of the drug or device.

(b) Separate Proceeding To Determine Punitive Damages:

(1) Considerations: At the request of a medical product producer in a health care liability action in which a medical product liability claim is alleged against the producer, the trier of fact shall consider in a separate proceeding--

(A) whether punitive damages are to be awarded and the amount of the award; or

(B) the amount of punitive damages following a determination of punitive liability.

(2) Evidence: If a separate proceeding is requested in accordance with paragraph (1), evidence relevant only to the claim of punitive damages (as determined by applicable State law) shall be inadmissible in any proceeding to determine whether compensatory damages are to be awarded to the claimant.

(c) Criteria for Determining Amount of Punitive Damages: Subject to the limitation on punitive damages provided in section 202(e), all relevant evidence shall be considered in determining the amount of punitive damages assessed with respect to a medical product liability claim, including--

(1) the financial condition of the medical product producer;

(2) the severity of the harm caused by the conduct of the medical product producer;

(3) the duration of the conduct or any concealment of the conduct by the medical product producer;

(4) the profitability of the conduct to the medical product producer;

(5) the number of products sold by the medical product producer of the kind causing the harm complained of by the claimant;

(6) awards of punitive or exemplary damages to persons similarly situated to the claimant;

(7) prospective awards of compensatory damages to persons similarly situated to the claimant;

(8) any criminal penalties imposed on the medical product producer as a result of the conduct complained of by the claimant; and

(9) the amount of any civil fines assessed against the defendant as a result of the conduct complained of by the claimant.

SEC. 208. JURISDICTION OF FEDERAL COURTS.

The district courts of the United States shall not have jurisdiction of any health care liability action based on sections 1331 or 1337 of title 28, United States Code.

SEC. 209. PREEMPTION.

(a) In General: This title supersedes any State law only to the extent that the State law permits the recovery by a claimant or the assessment against a defendant of a greater amount of damages, permits the awarding of a greater amount of attorneys' fees, establishes a longer period during which a medical malpractice claim or medical product liability claim may be initiated, or establishes a less strict standard of proof for determining whether a defendant has committed malpractice, than the provisions of this title.

(b) Effect on Sovereign Immunity and Choice of Law or Venue: Nothing in this title shall be construed to--

(1) waive or affect any defense of sovereign immunity asserted by any State under any provision of law;

(2) waive or affect any defense of sovereign immunity asserted by the United States;

(3) affect the applicability of any provision of the Foreign Sovereign Immunities Act of 1976.

(4) preempt State choice-of-law rules with respect to claims brought by a foreign nation or a citizen of a foreign nation; or

(5) affect the right of any court to transfer venue or to apply the law of a foreign nation or to dismiss a claim of a foreign nation or of a citizen of a foreign nation on the ground in inconvenient forum.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Plaintiff(s),
v.
M.D. and
EMMA HOSPITAL ALASKA, INC.,

Defendant(s).

NOTICE OF THE FILING OF
EXPERT ADVISORY PANEL'S
REPORT(S)

TO: Attorneys/parties of record

RECEIVED

FEB 24 1992

LIBBEY & SUDDOCK

Case No. 3AN-91-6699 Civil.

You are heroby notified that the Expert Advisory Panel has filed its Report(s) in the above-captioned action, pursuant to A.S. 09.55.536. A copy of the panel's Report(s) accompanies this Notice.

Cassette tape(s) or written statement(s) submitted by the panel with the Report(s) will be held in the court file for your review upon request.

This medical malpractice action will no longer be held separate from the other civil case files.

DATED this 24th day of February, 1992.

CLERK OF COURT

Enclosure: Report(s)

By

Deputy Clerk

Description of Cassette(s)/Statement(s):

micro-cassette of interviews with Dr. ~~XXXXXX~~ and
Michelle Reeves, R.N.

This is to certify that on 2-24-92 a
copy of this Notice was sent to the
attorneys/parties of record:

and professional association:

Deputy Clerk

REPORT BY THE EXPERT ADVISOR PANEL

CASE NAME: vs , M.D. and Himana Hospital Alaska, Inc.

CASE NUMBER: 3AN-91-6639 Civil

REPORT ON DEFENDANT: , M.D.

The expert advisory panel in the above-referenced case, being duly appointed, has reviewed all the medical records and exhibits provided by the parties and makes the following report on the above-named defendant, pursuant to Alaska Statute 09.55.536.

QUESTION: What was the disorder for which the plaintiff came to medical care?

ANSWER: Painful right knee - possibly secondary to the patella; possibly due to a torn meniscus.

QUESTION: What would have been the probable outcome without medical care?

ANSWER: Probable continued painful right knee.

REPORT, Page 0000

CASE NUMBER: 3AN-91-6689

Civil

DEFENDANT:

M.D.

QUESTION: Was the treatment selected appropriate for the case?

ANSWER: Yes.

QUESTION: Did an injury arise from the medical cure?

ANSWER: Yes.

REPORT, Page thr
CASE NUMBER: 3AN-91-6689 Civil
DEFENDANT: [REDACTED], M.D.

QUESTION: If an injury did arise from the medical care,
what is the nature and extent of the medical injury?

ANSWER: The incorrect knee was operated upon. This caused the patient
surgical pain and secondary weakness in that leg requiring
rehabilitation. It would be anticipated that the patient
should recover from this surgical procedure.

QUESTION: If an injury did arise from the medical care,
what specifically caused the medical injury?

ANSWER: Surgical procedure was performed on the incorrect leg.

REPORT, Page four.

CASE NUMBER: 3A-71-6689 Civil

DEFENDANT: [REDACTED] M.D.

QUESTION: If an injury did arise from the medical care,
was the medical injury caused by unskillful care?

ANSWER: No.

QUESTION: If a medical injury had not occurred, how would
the plaintiff's condition differ from the
plaintiff's present condition?

ANSWER: This is unknown since the preoperative condition of the
left knee and leg is not known and cannot be compared with
the present testing information.

DATED: January 30, 1992

[Signature]
Panel Member

[Signature]
Panel Member

[Signature]
Panel Member

**ALL PANEL MEMBERS MUST SIGN THE REPORT, UNLESS DISSENTING
REPORTS ARE FILED.

***COMPLETION OF ATTACHMENT "A" IS MANDATORY.

REPORT, Page six.
CASE NUMBER: 3AN-91-0689 Civil
DEFENDANT: [REDACTED], M.D.

ALL EXHIBITS EXAMINED BY PANEL THAT
ARE NOT REPRODUCIBLE ON PAPER, SUCH
AS X-RAYS, SLIDES, MODELS, ETC.

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10.

ATTACHMENT "A"

REPORT, Page Five.

CASE NUMBER: 3AN-91-6689 Civil

DEFENDANT: ~~XXXXXXXXXX~~, M.D.PERSONS INTERVIEWED BY EXPERT PANEL

REMINDER: You must maintain a recording of any testimony or statements of witness and you must file copies of all tapes or written statements with your report.

1. ~~XXXXXXXXXX~~ M.D. - January 29, 1992
2. Priscilla Reeves R.N. - January 29, 1992
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10.

ALL TREATISES OR MEDICAL LITERATURE
REFERENCED BY THE EXPERT ADVISORY PANEL

1. Medical Records provided by Mr. John Suddock
2. Medical Records provided by Mr. Sigurd E. Murphy
3. Medical Records provided by Timothy J. Lamb
- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10.



RECEIVED MAR 17 1995

Greetings, ALEC member:

In this packet, you will find recent publications on issues ranging from prison overcrowding to telecommunications regulation. We have also included remarks made by U.S. Speaker of the House Newt Gingrich (R-Ga.) during the orientation for freshmen Republican congressmen. You will note in the speech numerous references to decentralized government, free enterprise and empowerment. The new Speaker provides critical insights into the new congressional leadership and the policies, many of which are part of the ALEC agenda, which they are advocating.

In the State Factor entitled *Conditional Early Release*, ALEC researchers show there is a workable solution to two problems whose answers seem to be in opposition. They demonstrate that there is indeed a way to ease prison and jail overcrowding while keeping violent criminals off the streets.

In The State Factor, *The Impact of Competition on Universal Service in the Local Telecommunications Marketplace*, you will learn why governments should allow the industry to develop and compete in open markets, where it flourishes. But to accomplish this, change is required in the regulatory structure.

Roughly 30 states have enacted laws requiring students in certified public accountant programs to take an additional 30 hours of college credit in order to graduate. In The State Factor, *The 150 Hour Law*, ALEC illustrates how the law hurts students, accounting firms, taxpayers, and eventually consumers.

ALEC Proceedings features speeches made at the 1993 Annual Meeting in Traverse City, Michigan, the 1993 National Orientation Conference and the 1994 National Leadership Summit on Economic Growth in San Antonio, Texas.

As usual, I am confident you will find all the information useful in fulfilling your legislative duties.

Sincerely,

Samuel A. Brunelli
Executive Director

House GOP Freshman Orientation Leadership for America's 21st Century

**Honorable Newt Gingrich
Speaker, U.S. House of Representatives**

RECEIVED MAR 17 1995

The world is in a period of transition of historic proportions. Across the planet middle class voters are shaking governments with their outspoken discontent and unhappiness. Voter dissatisfaction is translating into political unpopularity and then political unpopularity is translating into defeat, even collapse of governments. From the fall of the Soviet empire to the replacement of the Italian postwar political system, the annihilation of the French Socialists, the virtual elimination of the Canadian governing party, (which fell from 153 seats to two seats in the 1993 election), to the replacement of the LDP as the governing party of Japan after a 38 year monopoly of power, again and again the working middle class is displaying its anger and dissatisfaction by punishing governments.

Here in the United States the same kind of voter dissatisfaction powers the term limits movement (77% public support) the United We Stand effort and the Ross Perot presidential candidacy (19%, one of the highest third-part votes in over a century), the election of Republicans the the New York, Los Angeles, and Jersey City mayoralties and the rebellion against government interference in the West and against property tax increases in the Midwest and East.

The challenge to political leaders is to find solutions that actually give voters some hope that their lives will improve. Promises based on inadequate or wrong analysis are not solutions. They are merely campaign slogans bound to fail and thus increase cynicism and alienation.

The failure of politicians in America and across the planet has not been a failure of money or courage. It has been an intellectual failure of the postwar political system that is now obsolete and incapable of regenerating itself.

The current failure of governments is not inevitable and it need not be long lasting. The voters do not need to adjust to malaise, or become dramatically more patient, or lower their standards and expectations. (all pleas from political elites who have failed and would like to lower the curve for measuring the success of government, asking the voters to behave like the SAT board and pretend that incompetence and non-performance should be scored higher because, "times have changed").

We need a generation of leadership that recognizes our current problems are largely intellectual and that we need new ideas. Even more importantly, we need a new framework for these ideas, (what Thomas Kuhn called a Paradigm Shift in The Structure of Scientific Revolutions).

An easy way to contrast the timidity of the failed political elites and the boldness and comprehensiveness of thought needed for successful leadership in our generation is the difference between the words reform and replace.

The baseiged elites of the old order want to reform their failing governments. These futile reform efforts invariably involve bigger bureaucracies and higher taxes. They inevitably lead to poorer services at a higher cost and create voter discontent.

New leadership recognizes that the obsolete, failing, current system needs to be replaced, not reformed. New leadership recognizes that the current welfare state structure of government is built on an industrial-era model within a nation-state economy on social worker assumptions that have clearly failed. Raising taxes to try to improve the obsolete is simply throwing money away, increasing the agony and lengthening the political-financial burden on those who work more to earn less.

New leadership must build a new team around new assumptions that are designed to replace rather than reform the welfare state. This new framework must take into account the objective realities of the information revolution (Toffler's third wave of change), the emerging world market, and the basic lessons of American civilization that have worked for over 300 years and need to be restudied and reapplied to the emerging new global economic and technological realities.

This new intellectual framework has been emerging over the last quarter century in widely scattered efforts at explaining the modern world. Peter Drucker's The Age of Discontinuities (1969), Kenneth Boulding's The Meaning of the Twentieth Century (1964), and Alvin and Heidi Toffler's Future Shock (1970), The Third Wave (1980), and War and Anti-War (1993), George Gilder's Microcosm (1989), Edwards Deming's Out of the Crisis (1982), have all outlined the scale of change we are living through. No one who reads these works could believe the entire technological and economic framework of our lives can change while somehow the structure of government can remain the same.

Our job as leaders is to understand this new third wave, information revolution, and the need to compete within a pervasive global market and develop a replacement for the welfare state. By combining technological potential and economic realities with the classic strengths of American civilization it is possible to develop a new model of a successful America that will be dramatically more prosperous, more powerful, and more desirable.

There is every reason to believe that Americans could live safely in the healthiest, most prosperous society on the planet with the highest quality of life, the best standard of living, and the greatest range of choices.

There is every reason to believe that the next generation could have a greater opportunity to pursue happiness than any generation in American history.

The economic opportunities and technological opportunity will be available if we can stop obsolete political elites and an obsolete welfare state from blocking the future and protecting the past.

This paper is an initial introduction to the ideas necessary to replace the welfare state with an opportunity society. It is designed for elected officials and would-be elected officials as an introduction to leadership in an age of extraordinary change.

The changes that are coming are so great that no one knows the answers. That includes this paper. Consider this a work in progress open for critique and improvement, and feel free to send me your ideas and your suggestions.

This challenge is so great that only a team effort can bring about the transformation that is needed. It is to that teamwork and the rewards of that transformation that this paper is dedicated.

I. An analysis, planning, decision and implementation model

Vision
Strategies
Projects (a definable, delegatable achievement)
Tactics (Daily behavior)

II. The five great truths of our generation.

1. The information revolution is so powerful that it is the third great wave of change in human history. Only the rise of agriculture and the rise of industry are comparable. Alvin Toffler's The Third Wave describes the pervasive ways in which every aspect of life will be transformed by this revolution. We must rethink society and government within the challenge of this enormous change.

2. The world market is real and will shape our lives. Our children will compete with workers in other countries the way our parents competed with workers in other American states. South China will set the price of labor for the next two generations. If we want our children to have the highest standard of living with the highest take-

home pay and the greatest range of options we will have to be very market-oriented, very entrepreneurial, very focused on the requirements of the competition. This will require rethinking litigation, regulation, taxation, education, and the delivery systems and bureaucracies of government to reshape each so it contributes to, rather than undermines, our ability to compete in a world market.

3. The welfare state has failed. It is impossible to maintain civilization with twelve-year-olds having babies, fifteen-year-olds killing each other, seventeen-year-olds dying of AIDS and eighteen-year-olds receiving diplomas they cannot read. All these things are happening in America today and American civilization is decaying. The Great Society experiment in replacing families with social workers, the work ethic with government payments, the neighborhood with a public housing bureaucracy and police with social workers has simply failed. We must replace the welfare state with an opportunity society dedicated to rebuilding personal strength, the family structure, the fabric of community, and the energetic pursuit of happiness which is at the core of American civilization.

4. The combination of the third wave information revolution, the economic pressures of the emerging world market, the failures and dangers of the collapsing welfare state, and the bankruptcy of the post-intellectual elite of the old order have led to a level of citizen alienation that may be deeper than anything America has seen since the American revolution. From term limits to ratings of Congress to virtually universal cynicism and contempt for both the process of self government and the people who participate in it, the simple fact is that Americans feel alienated, unrepresented, and in many ways betrayed by those to whom they have loaned power. Inventing the third wave of information revolution self government system that rebounds the voter to those entrusted with public office may be one of the most important and most difficult challenges of our time.

5. We must find a new path to replace the welfare state with an opportunity society and to replace the centralized government approach with a dramatically, even radically decentralized approach that relies on each and every citizen and each community to provide leadership and creativity. This requires a degree of devolving power out of Washington that virtually no one has thought through at this point. Furthermore, this devolution of power cannot just be to shift responsibility and resources between Washington and the State Capitals. It is not enough just to return power to state and local government. We must think through the process of returning power to local citizens, local voluntary associations, private businesses, and only then to local, state, and finally federal governments.

America is now facing a series of changes so profound that only an aroused, informed citizenry will be able to think through, decide and implement enough changes on a large enough scale and with enough understanding of local conditions and local realities.

It is impossible for a small group of politicians or bureaucrats to understand a country this vast and a people so diverse and numerous. Only a boldly decentralized system will be able to work through the many changes that the third wave information age and the world market will make necessary in the next few years.

Yet a decentralized system that relies on citizen leadership and on voluntary activities actually requires a more thorough approach to developing principles, tools, habits and values. A decentralized system has to have some core beliefs and core principles which are widely understood and agreed to if it is to be effective.

Decentralization only works if people have a clear sense of their general direction and the principles, values, framework and habits which mark that direction. In a very real sense, freedom actually requires more learning, more knowledge than slavery. As a slave, you simply do what you are told. As a free person, you must have some core framework of thought which enables you to function effectively in a free society.

While a core set of ideas is important for a free person, the concept of a core set of ideas is more important for a free nation. Defining the rules of the game. Outlining what it means to be an American. Creating a framework of expectations so people will know what their civilization expects of them and what rewards they will get if they meet the expectations (What Yankelovich called a giving and getting contract). Each of these core concepts has to be outlined and clearly understood if America is to work as a society.

Precisely because we want our central government to be limited in its powers and authority and we want our bureaucrats to stay out of our life and our neighborhood, it is vital that we bind ourselves by intellectual principles

rather than governmental rules.

III. Vision

We must build a prosperous safe America in which every American has a sense of personal strength and unlimited opportunity and in which the pursuit of happiness has led the American people to create an American nation economically, militarily, and morally able to help the entire human race achieve self government, safety, and prosperity. We must build an America in which the combination of the opportunities created by the third wave information revolution and the changes requires to be the most productive, competitive nation in the world has created an opportunity society with the best health, the best learning, the greatest safety, the highest standard of living, the best quality of life, and an empowerment of citizens which has led to the greatest range of personal, family, community, and business opportunities in the world.

IV. Leadership for America's 21st Century.

1. Listen-Learn-Help-Lend is our four step process necessary for leadership in a third wave information revolution in America. There will be no singular leaders directing from above. This leader-team will be the key model and leaders will always begin by listening and learning, then helping and only leading as the fourth step in the process.

2. The elected leader has multiple roles of descending importance and they are often the opposite in importance from the traditional pattern of the welfare state. In order of power and impact they are:

A. Visionary definer, agenda setter, and value articulator for the community. The leader in the "bully pulpit" of Theodore Roosevelt's phrase.

B. Symbol of community power and standing. Going to key events sends the signal of status and legitimacy. Use your office to honor, empower, and strengthen those who are doing what you believe is important.

C. Recruiter of talent and energy and gatherer of community resources to achieve goals you believe in.

D. Administrator and manager of government. Note that in the welfare state managing the government has crowded out the three most important roles of community leadership. Remember that the urgent drives out the important. Leadership is forcing the important ahead of the urgent. The best book to help you distinguish between the urgent and to teach you to delegate the less important so you focus on the more important is Peter Drucker's The Effective Executive. You should buy a copy, read it, and reread it every five years.

3. The Jeffersonian model of a free society is the key to understanding why leaders must focus first on leading the community and last on managing the government. In a free society the vast bulk of the energy and resources are outside government. Focusing on managing the bureaucracy actually limits the leader and reduces his or her resources. The Jeffersonian model deliberately limits government so the other aspects of a free society can flourish. Jefferson understood that a deliberately limited but effective government could sustain and encourage freedom and prosperity but a large, pervasive government would inevitably crowd out the elements that are vital to a free people. Gordon Woods, a leading intellectual historian of the American Revolution and the Founding Fathers, helped me understand this very sophisticated Jeffersonian model of freedom which is the basis of the country Alexis De Tocqueville described in Democracy in America. The Jeffersonian model has four components and if any one crowds out or squeezes down the others, the entire process of freedom, prosperity, and safety suffers.

1. American Civilization and Culture. The habits and practices of a free society	3. Free Markets, private property, the rule of law incentives, the pursuit of happiness
2. Civic Responsibility, personal responsibility, doing your duty to society	4. Limited but effective government

The leader's job is to draw upon each of the four sectors as appropriate and to weave them together in a synergistic whole. Only by seeing yourself as the leader of all four components can you truly draw on all the resources and strengths of a free society. By overemphasizing the role of government, the Great Society experiment undermined the other three. Sometimes conservatives so ignore the role of limited effective government that they weaken the potential synergism. Economic conservatives often overstate the importance of section three while social conservatives tend to focus on one and two.

4. Listen to your community. You have in your community people and institutions in all four sectors who are busy inventing the tools of the third wave information revolution, learning to compete in the world market and seeking to replace the failed welfare state with more effective approaches. Listen to them and learn from them. Offer to help them in each of your four roles as community leader. Then recruit them to help you lead by helping you develop the vision, strategies, projects and tactics you need to transform your community from the welfare state into an opportunity society for all your citizens.

V. The five building blocks of American civilization.

1. Personal Strength. Without personal strength it is impossible to maintain a free society. Every policy should be examined to see if it increases personal responsibility, productivity, safety, and self-reliance or if it undermines them.

2. Entrepreneurial Free Enterprise. The application of personal strength to the pursuit of happiness by fostering a spirit of "can do" enthusiasm and determination to get the job done

3. The spirit of innovation and discovery. The zest for new ideas, new inventions and new learning, which made Benjamin Franklin, Thomas Edison, the Wright brothers, Henry Ford and in our times Bill Gates, Steven Spielberg, and Jack Horner are good examples of the spirit of learning inventing and discovering.

4. The system and culture of quality and profound knowledge as developed by Edward Deming. Deming's systemization of a culture of productivity and teamwork provides a framework for extraordinary breakthrough in productivity by virtually any system in virtually any endeavor. Popularized first in Japan it is in fact based in the Classic American virtues of the period, 1910-1940 (hard work, integrity, commitment to achievement, etc.) Joseph Juran and Phil Crosby are important contributors to this movement emphasizing somewhat different approaches than Deming.

5. The lessons of American history. American has liberated, empowered, and liberated to pursue happiness more people from more ethnic religious, racial and cultural backgrounds than any other civilization in history. Yet America's elites insist on seeking answers in European socialism, academic theories, and any other source which avoids the habits and practices of America. For over three hundred years America has been successful in creating unique opportunities for people. As a general principle it is useful to begin seeking a solution or thinking through a problem by asking how other Americans in other eras have solved similar problems or met similar challenges.

VI. Further steps toward renewing American civilization.

Since this is clearly a very brief introduction to an extraordinarily complex topic you might find it useful to look at some of the steps that are being taken to develop these ideas further.

1. Renewing American civilization. A twenty hour course taught each Winter at Rhinehart College in Waleska, Georgia. The current course is available on videotape every Wednesday from 1 to 3 PM eastern time on National Empowerment Television (a new satellite cable channel). The audio and videotape versions are also available by calling 1-800-TO-RENEW. A new version will be taught in January, 1995 and will be available in Washington. Congressman Pete Hoekstra } (teaches the course at Hope College in Michigan)

2. The Progress Report. A television call in show hosted by Newt Gingrich and Heather Higgins and Produced by the Progress and Freedom Foundation. It is on from 10 to 11 PM every Tuesday evening and focuses on new ideas, new inventions, and breakthroughs that make progress possible.

3. **GOPAC (202-484-2282)** a Republican campaign organization that develops training tapes, seminars and conference calls dedicated to sharing new solutions, new proposals, and new lessons that will help transform the welfare state into an opportunity society.

4. **The Congressional Institute (202-547-4600)** a nonprofit foundation open to all citizens who want to help develop the process of self government in the third wave of the information age. Every state and local community should consider developing a similar nonprofit (and therefore much more independent, innovative, inexpensive, and flexible than a government system would be) institution to work with entrepreneurial activists and inventors to develop experiments from which will grow the self government and citizen involvement of the future. Jerry Klimer, the head of the Institute would be glad to share his experiences and insight with both Democratic and Republican Legislators.

5. **American Civilization** a new monthly newspaper that will be reporting on the inventions, ideas solutions and experiments that will help America make the transition to a third wave information age country capable of competing successfully in the world market with an opportunity society that offers every citizen full participation in the pursuit of happiness and responsibility of citizenship. Frank Gregorsky, the editor is looking for both readers and good success stories, you can reach him by phone (202-484-2312), fax (202-484-9326) or e-mail (PFF @ AOL.COM).

6. The Progress and Freedom Foundation
7. The American Legislative Exchange Council (ALEC)
8. The Heritage Foundation
9. Project for the Republican Future
10. Americans for Tax Reform

VII. Zones of Invention and Creativity

1. Health
2. Jobs
3. Public Safety
4. Learning
5. The culture and systems of poverty and violence
6. The patterns of government and bureaucracy
7. Litigation
8. Bureaucracy, regulation and the spirit of speed limits
9. Taxation in the world market in the third wave information age

VIII Last Thoughts

"Our generation has a rendezvous with destiny" When President Franklin Roosevelt said those words America was on the verge of world War II and our continued freedom required defeating Nazi Germany, Fascist Italy, and Imperial Japan. Our parents and grandparents rose to the challenge.

After World War II our destiny required us to contain the Soviet Empire for 45 years until it collapsed. We rose to the challenge.

Today our destiny is to be found here at home. We cannot afford another generation of decay, violence, and despair. Our generation must replace the welfare state with an opportunity society if American civilization is to be renewed and the American dream restored.

No one knows how to complete the transformation from an industrial second wave society to an information third wave society. No one truly knows what we have to do to be the most productive and most competitive country in the world. No one has invented a new model of self government that reestablishes public accountability and public faith in elected officials and the government instruments necessary for a free society.

We are all in this quest together. This is our generation's rendezvous. We need your involvement and help. Together we can give our children and grandchildren the freedom, safety and prosperity we want for them.

Together we can create the renewal of America which will allow us to lead the human race to the rule of law, private property, self government, and safety.

On the one hand are the barbarism, violence and brutality of Bosnia, Rwanda, Haiti and all too many of our own streets and neighborhoods. On the other hand there is the decency, safety and opportunity to pursue happiness inherent in the founding fathers dream of America.

We will decide by our commitments, our courage, and our creativity which path our children and grandchildren (and their country) will be on.



Alaska Action Trust

P.O. Box 102323 • Anchorage, Alaska 99510
Office: 540 "E" Street, Suite 206 • Anchorage, AK 99501
(907) 258-4040 • FAX (907) 276-7185

February 10, 1995

Senator Taylor
State Capitol, Room 30
Juneau, Alaska 99801

HAND DELIVERED

Dear Senator Taylor,

Earlier this week I dropped off a copy of HB 158, the omnibus tort "reform" bill along with an executive sectional review. The sectional review contained a misstatement as to section 2, eight year statute of repose. This section does not pertain to product liability, only liability for negligent construction and design.

I have attached a corrected sectional summary. A detailed sectional analysis should be available for distribution the end of next week. I will forward that summary to you as soon as I have completed it. I am sorry for any confusion caused by the mistaken analysis of section 2 earlier this week.

Sincerely,

Debra C. Gravo
Executive Director
dch/encl.

EXECUTIVE SECTIONAL SUMMARY
Prepared by Alaska Action Trust

HB 158, "An Act relating to civil actions; amending Alaska Rules of Civil Procedure 49, 68, and 95; amending Alaska Rule of Evidence 702; and providing for an effective date."

Introduced February 6, 1995

Sponsor(s): Representatives Porter and Toohey

Referrals: House Judiciary and Finance

- Section 1: Findings and Purpose.
- Section 2: Statute of repose of eight years; eliminates liability for negligent construction and design after eight years.
- Section 3: A minor has until their 8th birthday to sue a health care practitioner for malpractice; decreases amount of time to address injuries sustained by children.
- Section 4: 2-year statute of limitations for torts.
- Section 5: 2-year statute of limitations for personal or property injury.
- Section 6: Noneconomic damages capped at \$300,000 except for most severely injured, cap at \$500,000; limits amount that can be recovered in cases of catastrophic injury.
- Section 7: Punitive damage standard of proof raised to "clear and convincing evidence of malice or conscious acts showing deliberate disregard of another person by the person from whom the punitive damages are sought"; makes it practically impossible to punish willful offenders.
- Section 8: Punitive damages are capped at three times compensatory or \$300,000 whichever is greater and half of the award goes to general fund of state.
- Section 9: Economic damages will be reduced by federal and

state income tax; eases financial responsibility of wrongdoers.

Section 10: Periodic payments are available at the defendant's request for awards over \$100,000; takes away injured party's right to choose how judgment will be paid.

Section 11: If judgment is paid by periodic payments, the court requires a security be posted except if entity is state or authorized insurer.

Section 12: Payment of future damages by periodic payment will include increases in future payments for anticipated inflation.

Section 13: Changes collateral benefit rules; affects injured party's ability to be reimbursed for insurance costs and ability to choose a doctor.

Section 14-15: Changes apportionment of fault statute; shifts responsibility for wrongdoing to parties who are missing or immune from prosecution.

Section 16: Releases.

Section 17: Offers of judgment.

Section 18: Interest on judgments is 3% above Federal Reserve rate.

Section 19: Prejudgment interest is not awarded for future economic damages, future noneconomic damages and punitive damages; allows wrongdoers to profit from delaying the settlement process.

Section 20: Uniform Arbitration Act.

Section 21-22: Medical expert witness qualification.

Section 23: Contingent fees are to be calculated after the portion of the punitive damage award which goes to the state is deducted.

Section 24: Overrules Jackson v Powers; eliminates hospitals' responsibility for negligent acts caused by contract emergency room health care providers.

Section 25: No damages for personal injury by anyone engaged in felony.

Section 26: Signing of pleading and sanctions.

- Section 27: 09.55.548 is repealed.
- Section 28: Civil Rule 49 is amended.
- Section 29-30: Civil Rule 68 is amended.
- Section 31-32: Rule of Evidence 702 is amended.
- Section 33: Civil Rule 95 is amended.
- Section 34: Severability clause.
- Section 35: Applicability clause.
- Section 36: Effective date: July 1, 1995.

Classified
cont. from
F-5

Invitations
To Bid

Invitations
To Bid

910

910

proposals, please arrive at the
Practical Document Room, 900
NAPAKIAK SCHOOL, SELOCA
TION FEASIBILITY STUDY
bidding date for this project July
12, 1995 at 10:00 a.m.
The subject is at page 2 of the
RFP.

Gun seller settles with injured teen

Western Auto agrees to pay more than \$4.25 million in '89 accidental shooting

By SHEILA TOOMEY
Daily News reporter

A gun retailer that won, then lost, a jury verdict last year, has paid more than \$4.25 million to settle out of court the case of a permanently disabled Nikiski youth.

Kevin Taylor, was 11 in 1989 when the rifle he was playing with fell apart, discharging a .22-caliber bullet into his brain. After more than six operations and years of rehabilitative treatment, Taylor, now 17, is entering his senior year at Nikiski high school and must use a wheelchair, said his attorney, Mike Moody.

The Taylor family had no health insurance and has incurred about \$500,000 in medical bills so far, Moody said. And Kevin will require specialized care for the rest of his life.

The case came to public notice in March 1994 when a Kenai jury concluded the Taylors were not entitled

to any damages. Computers indicated the jury had turned down a paylors settlement offer of \$4.25 million.

Jurors apparently concluded the company was not responsible for a design defect. The gun was manufactured by Savage Arms Corp., which has since gone into bankruptcy, and was sold by Western Auto.

The fact that Taylor's father bought the rifle second-hand further complicated the issues.

But Western Auto's pleasure at the outcome was short-lived. In November, Kenai Superior Court Judge Jonathan Link threw out the jury verdict and ordered a new trial. In an unusually harsh opinion, Link accused Western attorneys and the jury forewoman of improper conduct. Link also ruled that the rifle was in fact defective in design.

The case was headed into a second trial when both sides signed off on the out-of-court settlement.

Lawyers for both sides refused to say exactly how much Western Auto paid. "All I can tell you is that it is a lot more than the well-publicized offer of \$4.25 million that we rejected," Moody said.

Jim Powell, an attorney for Western, said his client paid off despite a belief that the judge's rulings were reversible on appeal. So, why settle if that's so?

"It takes time, it costs money; and the injuries were very serious," Powell said.

"And nothing is ever certain."

Western could not appeal Link's rulings until after the second trial. And even if the appeals courts agreed with them, all Western could get is a third trial, he said.

The Taylors originally

asked for \$7.8 million. "Finally they decided to get reasonable," Powell said.

Because Kevin Taylor is a minor, the money will go into a formal trust and be administered by a committee "to provide for his needs over his lifetime," Moody said. "It's really nice that it worked out well in the end."

Mike Moody
276 1700

sent to me by (I called him)
(Bob) R. W. Nestel (back and

DATE: AUGUST 14, 1995

TO: THE HONORABLE ROBIN TAYLOR
CHAIRMAN, JUDICIARY COMMITTEE

FROM: CATHY CRAWFORD
ASSOCIATE BROKER *Cathy Crawford*

PHONE: 789-5099

FAX: 789-0054

RE: PUBLIC HEARINGS ON TORT REFORM, HB 158

This memo is regarding the above HB 158. I have not read the bill, but have heard some of the input. I certainly do agree that we need to have changes made.

I, personally, am in danger of having my real estate license suspended for three months. The reason was the lending institution relied on an engineers phone call regarding a report he made to her and turned down a loan; the Buyer relied on the lending institution's suggestion. HOWEVER, when we gave testimony the engineer testified that he did not like the Soller and wanted to sour the deal so he lied to the lending institution.

Our attorney has the engineer's statements taped in his deposition and also when he was testifying at the hearing. When the commission met, these facts were disregarded, and although I was trying to consummate this transaction in a happy ending, this is what I am facing.

This is the sort of thing that happens to real estate people. The Good Lord knows that there are enough things that can go wrong, and we certainly do not need any help from other people. As far as I am concerned, this was a frivolous law-suit and should never have even been brought to a hearing when the Real Estate Commission knew in advance that the Engineer lied to make the deal fall through.

If you are interested in learning more about this case, I will be glad to talk with you. These sorts of things goes on all the time, but it seems that there is nothing that real estate people can do to protect ourselves. If we do something wrong, then we should answer for it. But the frivolity, vindictiveness of persons surely does make it a hardship for us.

I therefore am urging this HB 158 to be passed. Even if it cannot protect me, it surely will protect other small business.

Thank you for letting me speak my mind.

cc: Thyes Shaub, State Director

The United States Law Week

Extra Edition No. 1
Supreme Court
Opinions

June 20, 1995

THE BUREAU OF NATIONAL AFFAIRS, INC. WASHINGTON, DC

Volume 53, No. 68

OPINIONS ANNOUNCED JUNE 21, 1995

The Supreme Court decided:

ATTORNEYS—Solicitation

Florida ethics rule requiring lawyers to wait 30 days before sending targeted direct mail solicitation letters to victims of accident or disaster materially advances state's substantial interests in protecting privacy and tranquility of personal injury victims and reputation of legal profession, as shown by state bar's detailed study indicating that public views direct mail solicitations in immediate wake of accidents as intrusion on privacy that reflects poorly upon profession, and is reasonably tailored in scope and duration to do so, and thus does not violate First Amendment's protection of commercial speech. (*Florida Bar v. Went For It, Inc.*, No. 94-276)

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NOTE: Disclosure is not necessary to establish violation of 18 U.S.C. § 2232(c)'s prohibition of wiretap disclosure. (*U.S. v. Aguilera*, No. 94-270)

Full Text of Opinions

No. 94-270

UNITED STATES, PETITIONER v. ROBERT P. AGUILAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

By Order

No. 94-270 Argued March 20, 1995—Decided June 21, 1995

Respondent Aguilera, a United States District Judge, was convicted of illegally disclosing a wiretap to a violation of 18 U.S.C. § 2232(c), even though the authorization for the particular wiretap had expired before the disclosure was made. Aguilera's trial to Federal Bureau of Investigation (FBI) agents during a grand jury investigation, he also was convicted of conspiring to obstruct the due administration of justice under § 1503. The Court of Appeals reversed both convictions, reasoning that Aguilera's conduct in each instance was not covered by the statutory language.

NOTE: There is a dissenting opinion by Justice O'Connor (dissenting) will be released. It is the opinion of the Court has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Gannett, 443 U.S. 368, 377.

Held:

1. Uttering false statements to an investigating agent who might or might not testify before a grand jury is not sufficient to make out a violation of § 1503's prohibition of "obstruct[ing] or influence, obstruct, or to pervert . . . the due administration of justice." The "natural and probable effect" requirement developed in recent court of appeals decisions—whereby the accused's act must have a relationship in time, causation, or logic with grand jury or judicial proceedings—is a correct construction of § 1503's very broad language. Under that approach, the accused must take action with an intent to influence such proceedings. It is not enough that there be an intent to influence some auxiliary proceeding, such as an investigation independent of the court's or grand jury's authority. Moreover, the endeavor or must have the "natural and probable effect" of interfering with the due administration of justice, see, e.g., *United States v. Wood*, 6 F.3d 497, 505, 506. A person lacking knowledge that his actions are likely to affect a pending proceeding necessarily lacks the requisite intent to obstruct. *United States v. United States*, 100 U.S. 197, 204-207. The Government did not show here that the FBI agents acted as an arm of the grand jury, that the grand jury had subpoenaed their testimony or otherwise directed them to appear, or that respondent knew that his false statements would be provided to the grand jury. Indeed, the evidence goes no further than showing that respondent testified falsely to an investigating agent. What use will be made of such testimony is so speculative that the testimony cannot be said to have the "natural and probable effect" of obstructing justice.

2. Disclosure of a wiretap after its authorization expires violates § 2232(c), which provides criminal penalties for anyone who, "1) having knowledge that a Federal . . . officer has been authorized or has applied for authorization . . . to intercept a wire . . . communication, (2) in order to obstruct, hinder or prevent such interception, (3) gives notice or attempts to give notice of the possible interception to any person." Contrary to the Court of Appeals' holding, the statutory language does not require that the wiretap application or authorization be pending or in force at the time of the disclosure. Such a narrow purpose is not evidenced by the term "such interception" in the statute's second clause, which merely establishes that the defendant must intend to obstruct the interception made pursuant to the application or authorization of which he has the knowledge required by the first clause. Similarly, the phrase "possible interception" in the third clause was not designed to limit the punishable offense to cases where the interception was actually "possible," but was included to recognize the fact that at the time the prohibited notice was given it very likely could not be known whether or not there would be an interception. Moreover, without the word "possible" the statute would only prohibit giving notice of "the interception," it would not reach the giving of notice of an application which has not yet resulted in an authorization or an authorization which has not yet resulted in an interception. Finally, the statute could not be read to exclude disclosure of original wiretaps because of concern that a broader construction would run counter to the First Amendment. The Government's interest in nondisclosure by officials in sensitive confidential positions is quite sufficient to justify the construction of the statute as written, without any artificial narrowing because of First Amendment concerns.

31 F.3d 1473, affirmed in part, reversed in part, and remanded.

NOTICE: These opinions are subject to formal revision before publication in the preliminary form of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or minor factual errors, so that corrections may be made before the preliminary pages go to press.

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provision which ends it. Indeed, given the already broad terms of the other clauses in §1503, to limit the omnibus clause in the manner respondent urges would render it superfluous. See *United States v. Howard*, 559 F.2d 1331, 1333 (CA5 1978).

Respondent next contends that because Congress in 1982 enacted a different statute, 18 U.S.C. §1512, dealing with witness tampering, and simultaneously removed from §1503 the provisions it had previously contained specifically addressing efforts to influence or injure witnesses, see Victim and Witness Protection Act of 1982, Pub. L. 97-291, 96 Stat. 1249-1250, 1259, his witness-related conduct is no longer punishable under the omnibus clause of §1503. The 1982 amendment, however, did nothing to alter the omnibus clause, which by its terms encompasses corrupt "endeavors to influence, obstruct or impede, the due administration of justice." The fact that there is now some overlap between §1503 and §1512 is no more intolerable than the fact that there is some overlap between the omnibus clause of §1503 and the other provisions of §1503 itself. It hardly leads to the conclusion that §1503 was, to the extent of the overlap, silently repealed. It is not unusual for a particular act to violate more than one criminal statute, e.g., *Gaultes v. United States*, 220 U.S. 335, 342 (1911), and in such situations the Government may proceed under any statute that applies, see, e.g., *United States v. Butcher*, 442 U.S. 114, 123-124 (1979); *United States v. Beacon Brass Co.*, 344 U.S. 43, 45-46 (1953). In 1916, moreover, "a cardinal principle of statutory construction that repeals by implication are not favored." *United States v. United Continental Tuna Corp.*, 470 U.S. 164, 168 (1976); see also *Potestas v. National City Bank*, 296 U.S. 497, 503 (1936).

Finally, respondent posits that the phrase "corruptly . . . endeavors to influence, obstruct, or impede" may be unconstitutionally vague, in that it fails to provide sufficient notice that §1503 to potential grand jury witnesses in an effort to thwart a grand jury investigation is proscribed. Brief for Respondent 22, n. 13. Statutory language need not be colloquial, however, and the term "corruptly" in criminal laws has a long-standing and well-accepted meaning. It denotes "[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others. . . . It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it is not offered by another." *United States v. Ogil*, 643 F.2d 233, 236 (CA10) (internal quotation marks omitted), cert. denied, 449 U.S. 823 (1980). See also *Gallentine's Law Dictionary* 275 (3d ed. 1969); *Black's Law Dictionary* 345 (6th ed. 1990). As the District Court here instructed the jury:

"An act is done corruptly if it's done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or either to profit to oneself or a benefit of another person." App. 117.

Moreover, in the context of obstructing jury proceedings, any claim of ignorance of wrongdoing is incredible. Acts specifically intended to "influence, obstruct, or impede, the due administration of justice" are obviously wrongful, just as they are necessarily "corrupt." See *Ogil*, *supra*, at 233; *United States v. North*, 910 F.2d 843, 941

part), modified, 920 F.2d 940 (CA5 1990); *United States v. Reeves*, 752 F.2d 995, 999 (CA5), cert. denied, 474 U.S. 834 (1985).

The "nexus" requirement that the Court today engrafts into §1503 has no basis in the words Congress enacted. I would reverse that part of the Court of Appeals' judgment which set aside respondent's conviction under that statute.

JAMES A. FELDMAN, Assistant to Solicitor General (DREW S. DAVIS III, Sol. Gen.), and ANNE HARRIS, Asst. Atty. Gen., MICHAEL R. DREBEN, Asst. Sol. Gen., and PATTY MERKAMP STEMLER, Dept. of Justice, on the briefs for petitioners, ROBERT D. LUSKIN, Washington, D.C. (JOSEPH G. DAVIS, COMFY BOYD & LUSKIN, PAUL B. MELTZER, PETER A. LEEMING, and LAW OFFICES OF MELTZER & LEEMING P.C., on the briefs) for respondent.

No. 94-226

FLORIDA BAR, PETITIONER V. WENT FOR IT,
INC., AND JOHN T. BLAKELY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

Syllabus

No. 94-226. Argued January 11, 1995.—Decided June 21, 1995.

Respondent lawyer referral service and an individual Florida attorney filed this action for declaratory and injunctive relief challenging, as violative of the First and Fourteenth Amendments, Florida Bar rules prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. The District Court entered summary judgment for the plaintiffs, relying on *Eades v. State Bar of Arizona*, 437 U.S. 350, and subsequent cases. The Eleventh Circuit affirmed on similar grounds.

Held: In the circumstances presented here, the Florida Bar rules do not violate the First and Fourteenth Amendments.

(a) Rules and its progeny establish that lawyer advertising is commercial speech and, as such, is accorded only a limited measure of First Amendment protection. Under the "intermediate" scrutiny framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, a restriction on commercial speech that, like the advertising at issue, does not concern unlawful activity and is not misleading is permissible if the government: (1) asserts a substantial interest in support of its regulation; (2) establishes that the restriction directly and materially advances that interest; and (3) demonstrates that the regulation is "narrowly drawn." *Id.*, at 564-565.

(b) The Florida Bar's 30-day ban on targeted direct-mail solicitations withstands *Central Hudson* scrutiny. First, the Bar has substantial interest both in protecting the privacy and tranquility of personal injury victims and their loved ones against invasive, unsolicited contact by lawyers and in preventing the erosion of confidence in the professions that such repeated invasions have engendered. Second, the fact that the harms targeted by the ban are quite real is demonstrated by a Bar study, effectively corroborated by respondents' briefs, that contains extensive statistical and anecdotal data suggesting that the Florida public views direct-mail solicitations in the immediate wake of accidents as an invasion on privacy that reflects poorly upon the professions. *Edenfield v. Fane*, 507 U.S. 1075, 1081-1082; *Shapers v. Kentucky Bar Assn.*, 486 U.S. 496, 475-476; and *Reger v. Thurgood Drug Products Corp.*, 463 U.S. 80, 77, *congregated*. Third, the bar's scope is reasonably and tailored to its stated objectives. Moreover, its duration is limited to a brief 30-day period, and there are many other ways for injured Floridians to learn about the availability of legal representation during that time.

31 F.2d 1038, reversed.

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QUEST, G. J., and NICOLA, THOMAS, and BRYER, J. J., joined. KENNEDY, J. J., filed a dissenting opinion, in which STEVENSON, SOUTER, and GINSBURG, J. J., joined.

JUSTICE O'DONNOR delivered the opinion of the Court.

Rules of the Florida Bar prohibit personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. This case asks us to consider whether such rules violate the First and Fourteenth Amendments of the Constitution. We hold that in the circumstances presented here, they do not.

I

In 1989, the Florida Bar completed a 2-year study of the effects of lawyer advertising on public opinion. After conducting hearings, commissioning surveys, and reviewing extensive public commentary, the Bar determined that several changes to its advertising rules were in order. In late 1990, the Florida Supreme Court adopted the Bar's proposed amendments with some modifications. *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 671 So. 2d 451 (Fla. 1990). Two of these amendments are at issue in this case. Rule 4-7.4(b)(1) provides that "[a] lawyer shall not send, or knowingly permit to be sent, . . . a written communication to a prospective client for the purpose of obtaining professional employment if (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication." Rule 4-7.8(a) states that "[a] lawyer shall not accept referrals from a lawyer referral service unless the service: (1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer." Together, these rules create a brief 30-day blackout period after an accident during which lawyers may not, directly or indirectly, single out accident victims or their relatives in order to solicit their business.

In March 1992, G. Stewart McHenry and his wholly owned lawyer referral service, Went For It, Inc., filed this action for declaratory and injunctive relief in the United States District Court for the Middle District of Florida challenging Rules 4-7-4(b)(1) and 4-7-8 as violative of the First and Fourteenth Amendments to the Constitution. McHenry alleged that he routinely sent targeted solicitations to accident victims or their survivors within 30 days after accidents and that he wished to continue doing so in the future. Went For It, Inc. represented that it wished to contact accident victims or their survivors within 30 days of accidents and to refer potential clients to participating Florida lawyers. In October 1992, McHenry was disbarred for reasons unrelated to this suit, *The Florida Bar v. McHenry*, 605 So. 2d 452 (Fla. 1992). Another Florida lawyer, John T. Blahely, was substituted in his stead.

The District Court referred the parties' competing summary judgment motions to a Magistrate Judge, who concluded that the Florida Bar had substantial government interests, predicated on a concern for professional

quality of recent accident victims and their relatives and in ensuring that these individuals do not fall prey to undue influence or overreaching. Citing the Florida Bar's extensive study, the Magistrate Judge found that the rules directly serve those interests and sweep no further than reasonably necessary. The Magistrate recommended that the District Court grant the Florida Bar's motion for summary judgment on the ground that the rules pass constitutional muster.

The District Court rejected the Magistrate Judge's report and recommendations and entered summary judgment for the plaintiffs, 808 F. Supp. 1643 (MD Fla. 1992), relying on *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and subsequent cases. The Eleventh Circuit affirmed on similar grounds, 21 F. 3d 1038 (1994). The panel noted, in its conclusion, that it was "disturbed that *Bates* and its progeny require the decision" that it reached, 21 F. 3d, at 1045. We granted certiorari, 512 U.S. ____ (1994), and now reverse.

II

A

Constitutional protection for attorney advertising, and for commercial speech generally, is of recent vintage. Until the mid-1970s, we adhered to the broad rule laid out in *Valentine v. Christensen*, 316 U.S. 52, 54 (1942), that, while the First Amendment guards against government restriction of speech in most contexts, "the Constitution imposes no such restraint on government as respects purely commercial advertising." In 1976, the Court changed course. In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, we invalidated a state statute barring pharmacists from advertising prescription drug prices. At issue was speech that involved the idea that "I will sell you the X prescription drug at the Y price." *Id.*, at 761. Striking the ban as unconstitutional, we rejected the argument that such speech "is so removed from 'any exposition of ideas,' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all protection." *Id.*, at 762 (citations omitted).

In *Virginia State Board*, the Court limited its holding to advertising by pharmacists, noting that "[p]hysicians and lawyers . . . do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." *Id.*, at 773, n. 25. One year later, however, the Court applied the *Virginia State Board* principles to invalidate a state rule prohibiting lawyers from advertising in newspapers and other media. In *Bates v. State Bar of Arizona*, *supra*, the Court struck a ban on price advertising for what it deemed "routine" legal services: "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like." *Id.*, at 373. Expressing confidence that legal advertising would only be practicable for such simple, standardized services, the Court rejected the State's proffered justifications for regulation.

Nearly two decades of cases have built upon the foundation laid by *Bates*. It is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection. See, e.g., *Shaper v. Kentucky Bar Assn.*, 466 U.S. 466, 473 (1983); *Zauderer v. Office of Disciplinary Council of*

Supreme Court of Ohio, 471 U. S. 626, 637 (1985); *In re R. M. J.*, 455 U. S. 191, 199 (1982). Such First Amendment protection, of course, is not absolute. We have always been careful to distinguish commercial speech from speech at the First Amendment's core. "[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." *Board of Trustees of State University of N. Y. v. Fox*, 492 U. S. 469, 477 (1989), quoting *Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447, 466 (1978). We have observed that "[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." 492 U. S., at 481, quoting *Ohralik*, *supra*, at 456.

Mindful of these concerns, we engage in "intermediate" scrutiny of restrictions on commercial speech, analysing them under the framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N. Y.*, 447 U. S. 557 (1980). Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. *Id.*, at 563-564. Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: first, the government must assert a substantial interest in support of its regulation, second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest, and third, the regulation must be "narrowly drawn," *id.*, at 564-565.

II

"Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions," *Edenfield v. Fane*, 507 U. S. ____ (1993) (slip op., at 6). The Florida Bar asserts that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers. See Brief for Petitioner 8, 25-27, 21 F. 3d, at 1043-1044.¹ This interest obviously factors into the Bar's paramount (and repeatedly professed) objective of curbing activities that "negatively affect[] the administration of justice." *Id.* Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d, at 455; see also Brief for Petitioner 7, 14, 24; 21 F. 3d, at 1043 (describing Bar's effort "to preserve the integrity of the legal profession"). Because direct mail solicitations in the wake of accidents are perceived by the public as intrusive, the Bar argues, the reputation of the legal profession in the eyes of Floridians has

suffered commensurately. See Pet. for Cert. 14-15; Brief for Petitioner 28-29. The regulation, then, is an effort to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, "is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families." Brief for Petitioner 28, quoting *In re Arts*, 126 N. J. 448, 458, 599 A. 2d 1265, 1270 (1992).

We have little trouble crediting the Bar's interest as substantial. On various occasions we have accepted the proposition that "States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 792 (1975); see also *Ohralik*, *supra*, at 460; *Cohen v. Hurley*, 366 U. S. 117, 124 (1961). Our precedents also leave no room for doubt that "the protection of potential clients' privacy is a substantial state interest." See *Edenfield*, *supra*, at ____ (slip op., at 7). In other contexts, we have consistently recognized that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U. S. 455, 471 (1980). Indeed, we have noted that "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." *Frisby v. Schultz*, 487 U. S. 474, 484-485 (1988).

Under *Central Hudson*'s second prong, the State must demonstrate that the challenged regulation "advances the Government's interest in a direct and material way." *Rubin v. Coors Brewing Co.*, 514 U. S. ____ (1995) (slip op., at 10), quoting *Edenfield*, *supra*, at _____. That burden, we have explained, "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." 514 U. S., at _____. quoting *Edenfield*, *supra*, at _____. In *Edenfield*, the Court invalidated a Florida ban on in-person solicitation by certified public accountants (CPAs). We observed that the State Board of Accountancy had "present[ed] no . . . evidence . . . that the direct-mail solicitation of business clients by CPAs creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear." *Edenfield*, *supra*, at _____. (slip op., at 9). Moreover, "[t]he record [did] not disclose any anecdotal evidence, either from Florida or another State, that validate[d] the Board's suppositions." *Ibid.* In fact, we concluded that the only evidence in the record tended to "contradict[] rather than strength[en] the Board's submission." *Id.*, at _____. (slip op., at 10). Finding nothing in the record to substantiate the State's allegations of harm, we invalidated the regulation.

The direct-mail solicitation regulation before us does not suffer from such infirmities. The Florida Bar submitted a 106-page summary of its 2-year study of lawyer advertising and solicitation to the District Court. That summary contains data—both statistical and anecdotal—supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession. As of June

¹At prior stages of this litigation, the Bar asserted a different interest, in addition to that urged now, in protecting people against undue influence and overreaching. See 21 F. 3d, at 1043-1044; *cf.* *Shapiro v. Keefe*, 480 U. S. 614, 674-676 (1987); *Ohralik v. State Bar Assn.*, 436 U. S. 447, 461 (1978). Because the Bar does not press this interest before us, we do not consider it. Of course, our precedents do not require the Bar to point to more than one interest in support of its 30-day restriction, a single substantial interest is sufficient to satisfy *Central Hudson*'s first prong. See *Rubin v. Coors Brewing Co.*, 514 U. S. ____ (1995) (slip op., at 7-9) (deeming only one of the government's proffered interests "substantial").

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1989, lawyers mailed 700,000 direct solicitations in Florida annually, 40% of which were aimed at accident victims or their survivors. Summary of the Record in No. 74, 987 (Fla.) on Petition to Amend the Rules Regulating Lawyer Advertising (hereinafter Summary of Record), App. H, p. 2. A survey of Florida adults commissioned by the Bar indicated that Floridians "have negative feelings about those attorneys who use direct mail advertising." Magid Associates, Attitudes & Opinions Toward Direct Mail Advertising by Attorneys (Dec. 1987), Summary of Record, App. C(4), p. 6. Fifty-four percent of the general population surveyed said that contacting persons concerning accidents or similar events is a violation of privacy. *Id.*, at 7. A random sampling of persons who received direct-mail advertising from lawyers in 1987 revealed that 45% believed that direct-mail solicitation is "designed to take advantage of gullible or unstable people"; 34% found such tactics "annoying or irritating"; 26% found it "an invasion of your privacy"; and 24% reported that it "made you angry." *Ibid.* Significantly, 27% of direct mail recipients reported that their regard for the legal profession and for the judicial process as a whole was "lower" as a result of receiving this direct mail. *Ibid.*

The anecdotal record mustered by the Bar is noteworthy for its breadth and detail. With titles like "Scavenger Lawyers" (The Miami Herald, Sept. 29, 1987) and "Solicitors Out of Bounds" (St. Petersburg Times, Oct. 26, 1987), newspaper editorial pages in Florida have burgeoned with criticism of Florida lawyers who send targeted direct mail to victims shortly after accidents. See Summary of Record, App. B, pp. 1-8 (excerpts from articles); see also Peltz, Legal Advertising—Opening Pandora's Box, 19 Stetson L. Rev. 43, 116 (1989) (listing Florida editorials critical of direct-mail solicitation of accident victims in 1987, several of which are referenced in the record). The study summary also includes page upon page of excerpts from complaints of direct-mail recipients. For example, a Florida citizen described how he was "appalled and angered by the brazen attempt" of a law firm to solicit him by letter shortly after he was injured and his fiancée was killed in an auto accident. Summary of Record, App. I(1), p. 2. Another found it "despicable and inexcusable" that a Pensacola lawyer wrote to his mother three days after his father's funeral. *Ibid.* Another described how she was "astounded" and then "very angry" when she received a solicitation following a minor accident. *Id.*, at 3. Still another described as "beyond comprehension" a letter his nephew's family received the day of the nephew's funeral. *Ibid.* One citizen wrote, "I consider the unsolicited contact from you after my child's accident to be of the rankest form of ambulance chasing and in incredibly poor taste. . . . I cannot begin to express with my limited vocabulary the utter contempt in which I hold you and your kind." *Ibid.*

In light of this showing—which respondents at no time refuted, save by the conclusory assertion that the rule lacked "any factual basis," Plaintiffs' Motion for Summary Judgment and Supplementary Memorandum of Law in No. 92-370-Civ. (MD Fla.), p. 5—we conclude that the Bar has satisfied the second prong of the *Central Hudson* test. In dissent, JUSTICE KENNEDY complains that we have before us few indications of the sample size or selection procedures employed by Magid Associates (a nationally renowned consulting firm) and no copies of the actual surveys employed. See post, at 6. As stated, we believe the evidence adduced by the Bar

is sufficient to meet the standard elaborated in *Eidenfeld*, supra. In any event, we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, see *City of Renton v. Playtime Theatres, Inc.*, 478 U. S. 41, 80-81 (1986); *Barnes v. Glen Theatre, Inc.*, 501 U. S. 560, 584-585 (1991) (SOUTER, J., concurring in the judgment), or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense," *Burson v. Freeman*, 504 U. S. 191, 211 (1992). Nothing in *Eidenfeld*, supra, a case in which the State offered no evidence or anecdotes in support of its restriction, requires more. After scouring the record, we are satisfied that the ban on direct-mail solicitation in the immediate aftermath of accidents, unlike the rule at issue in *Eidenfeld*, targets a concrete, non-speculative harm.

In reaching a contrary conclusion, the Court of Appeals determined that this case was governed squarely by *Shapiro v. Kentucky Bar Assn.*, 486 U. S. 468 (1988). Making no mention of the Bar's study, the court concluded that "a targeted letter [does not] invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery." 21 P. 3d, at 1044, quoting *Shapiro*, supra, at 476. In many cases, the Court of Appeals explained, "this invasion of privacy will involve no more than reading the newspaper." 21 F. 3d, at 1044.

While some of *Shapiro*'s language might be read to support the Court of Appeals' interpretation, *Shapiro* differs in several fundamental respects from the case before us. First and foremost, *Shapiro*'s treatment of privacy was casual. Contrary to the dissent's suggestions, post, at 3, the State in *Shapiro* did not seek to justify its regulation as a measure undertaken to prevent lawyers' invasions of privacy interests. See generally Brief for Respondent in *Shapiro v. Kentucky Bar Assn.*, O. T. 1987, No. 87-16. Rather, the State focused exclusively on the special dangers of overreaching inhering in targeted solicitations. *Ibid.* Second, in contrast to this case, *Shapiro* dealt with a broad ban on all direct-mail solicitations, whatever the time frame and whoever the recipient. Finally, the State in *Shapiro* assembled no evidence attempting to demonstrate any actual harm caused by targeted direct mail. The Court rejected the State's effort to justify a prophylactic ban on the basis of blanket, untested assertions of undue influence and overreaching. 486 U. S., at 475. Because the State did not make a privacy-based argument at all, its empirical showing on that issue was similarly infirm.

We find the Court's perfunctory treatment of privacy in *Shapiro* to be of little utility in assessing this ban on targeted solicitation of victims in the immediate aftermath of accidents. While it is undoubtedly true that many people find the usage of lawyers sifting through accident and police reports in pursuit of prospective clients unpleasant and invasive, this case targets a different kind of intrusion. The Florida Bar has argued, and the record reflects, that a principal purpose of the ban is "protecting the personal privacy and tranquility of [Florida's] citizens from mass commercial intrusion by attorneys upon their personal grief in times of trauma." Brief for Petitioner 6; cf. Summary of Record, App. I(1)

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(citizen commentary describing outrage at lawyers' timing in sending solicitation letters). The intrusion targeted by the Bar's regulation stems not from the fact that a lawyer has learned about an accident or disaster (as the Court of Appeals notes, in many instances a lawyer need only read the newspaper to glean this information), but from the lawyer's confrontation of victims or relatives with such information, while wounds are still open, in order to solicit their business. In this respect, an untar­geted letter mailed to society at large is different in kind from a targeted solicitation; the untar­geted letter involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession unearthed by the Florida Bar's study.

Nor do we find *Bolger v. Youngs Drug Products Corp.*, 463 U. S. 60 (1983), dispositive of the issue, despite any superficial resemblance. In *Bolger*, we rejected the Federal Government's paternalistic effort to ban poten­tially "offensive" and "intrusive" direct-mail advertise­ments for contraceptives. Minimizing the Government's allegations of harm, we reasoned that "[r]ecipients of objectionable mailings . . . may effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.*, at 72, quoting *Cohen v. California*, 403 U. S. 15, 21 (1971). We found that the "short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." 463 U. S., at 72 (ellipses in original), quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (SDNY), summarily aff'd, 388 F. 2d 449 (CA2 1967). Concluding that citizens have at their disposal ample means of averting any substantial injury inhering in the delivery of objectionable contraceptive material, we deemed the State's intercession unnecessary and unduly restrictive.

Here, in contrast, the harm targeted by the Florida Bar cannot be eliminated by a brief journey to the trash can. The purpose of the 30-day targeted direct-mail ban is to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered. The Bar is concerned not with citizens' "offense" in the abstract, see post, at 4-5, but with the demonstrable detrimental effects that such "offense" has on the profession it regulates. See Brief for Petitioner 7, 14, 24, 28.¹ Moreover, the harm posited by the Bar is as much a function of simple receipt of targeted solici­tations within days of accidents as it is a function of the letters' contents. Throwing the letter away shortly after opening it may minimize the latter intrusion, but it does little to combat the former. We see no basis in *Bolger*, nor in the other, similar cases cited by the dissent, post, at 4-5, for dismissing the Florida Bar's assertions of harm, particularly given the unrefuted empirical and anecdotal basis for the Bar's conclusions.

Passing to Central Hudson's third prong, we examine the relationship between the Florida Bar's interests and the means chosen to serve them. See *Board of Trustees*

of State University of N. Y. v. Fox, 492 U. S., at 480. With respect to this prong, the differences between commercial speech and noncommercial speech are manifest. In *Fox*, we made clear that the "least restric­tive means" test has no role in the commercial speech context. *Ibid.* "What our decisions require," instead, "is a 'fit' between the legislature's ends and the means chosen to accomplish those ends; a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Ibid.* (citations omitted). Of course, we do not equate this test with the less rigorous obstacles of rational basis review; in *Cincinnati v. Discovery Net­work, Inc.*, 507 U. S. ___, n. 13 (1993) (slip op., at 7, n. 13), for example, we observed that the existence of "numerous and obvious less burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."

Respondents levy a great deal of criticism, echoed in the dissent, post, at 8-10, at the scope of the Bar's restriction on targeted mail. "[B]y prohibiting written communications to all people, whatever their state of mind," respondents charge, the rule "keeps useful information from those accident victims who are ready, willing and able to utilize a lawyer's advice." Brief for Respondents 14. This criticism may be parsed into two components. First, the rule does not distinguish between victims in terms of the severity of their inju­ries. According to respondents, the rule is unconsti­tutionally overinclusive insofar as it bans targeted mailings even to citizens whose injuries or grief are relatively minor. *Id.*, at 15. Second, the rule may prevent citizens from learning about their legal options, particularly at a time when other actors—opposing counsel and insurance adjusters—may be clamoring for victims' attentions. Any benefit arising from the Bar's regulation, respondents implicitly contend, is outweighed by these costs.

We are not persuaded by respondents' allegations of constitutional infirmity. We find little deficiency in the bar's failure to distinguish among injured Floridians by the severity of their pain or the intensity of their grief. Indeed, it is hard to imagine the contours of a regula­tion that might satisfy respondents on this score. Rather than drawing difficult lines on the basis that some injuries are "severe" and some situations appropri­ate (and others, presumably, inappropriate) for grief, anger, or emotion, the Florida Bar has crafted a ban applicable to all postaccident or disaster solicitations for a brief 30-day period. Unlike respondents, we do not see "numerous and obvious less burdensome alternatives" to Florida's short temporal ban. *Cincinnati*, supra, at ___, n. 13 (slip op., at 7, n. 13). The Bar's rule is reasonably well-tailored to its stated objective of elimi­nating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession.

Respondents' second point would have force if the Bar's rule were not limited to a brief period and if there were not many other ways for injured Floridians to learn about the availability of legal representation during that time. Our lawyer advertising cases have afforded lawyers a great deal of leeway to devise innovative ways to attract new business. Florida

¹ Merging this source altogether, the dissent asserts speculatively that we are "unwilling [to] leading First Amendment precedents," post, at 1, 4-5. We do no such thing. There is an obvious difference between situations in which the Government acts in its own inter­est, or on behalf of entities it regulates, and situations in which the Government is motivated primarily by paternalism. The cases cited by the dissent, post, at 4-5, focus on the latter situation.

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pertains lawyers to advertise on prime-time television and radio as well as in newspapers and other media. They may rent space on billboards. They may send untargeted letters to the general population, or to discrete segments thereof. There are, of course, pages upon pages devoted to lawyers in the Yellow Pages of Florida telephone directories. These listings are organized alphabetically and by area of specialty. See generally Rule 4-7.2(a), Rules Regulating The Florida Bar ("A lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, billboards and other signs, radio, television, and recorded messages the public may access by dialing a telephone number, or through written communication not involving solicitation as defined in rule 4-7.4"); *The Florida Bar: Petition to Amend the Rules Regulating The Florida Bar—Advertising Issues*, 571 So. 2d, at 481. These ample alternative channels for receipt of information about the availability of legal representation during the 30-day period following accidents may explain why, despite the ample evidence, testimony, and commentary submitted by those favoring (as well as opposing) unrestricted direct-mail solicitation, respondents have not pointed to—and we have not independently found—a single example of an individual case in which immediate solicitation helped to avoid, or failure to solicit within 30 days brought about, the harms that concern the dissent, see post, at 9. In fact, the record contains considerable empirical survey information suggesting that Floridians have little difficulty finding lawyers when they need one. See, e.g., Summary of Record, App. C(4), p. 7; id., App. C(5), p. 8. Finding no basis to question the commonsense conclusion that the many alternative channels for communicating necessary information about attorneys are sufficient, we see no defect in Florida's regulation.

III

Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer. See, e.g., *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *In re Primus*, 436 U.S. 412 (1978). This case, however, concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment. Particularly because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the "subordinate position" of commercial speech in the scale of First Amendment values. See, 492 U.S., at 477, quoting *Ohralik*, 436 U.S., at 456.

We believe that the Florida Bar's 30-day restriction on targeted direct-mail solicitation of accident victims and their relatives withstands scrutiny under the three-part *Central Hudson* test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. The Bar's proffered study, un rebutted by respondents below, provides evidence indicating that the harms it targets are far from illusory. The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution, in our

view, requires nothing more.

The judgment of the Court of Appeals, accordingly, is reversed.

JUSTICE KENNEDY, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

Attorneys who communicate their willingness to assist potential clients are engaged in speech protected by the First and Fourteenth Amendments. That principle has been understood since *Bates v. State Bar of Arizona*, 433 U.S. 380 (1977). The Court today undercuts this guarantee in an important class of cases and unsettles leading First Amendment precedents, at the expense of those victims most in need of legal assistance. With all respect for the Court, in my view its solicitude for the privacy of victims and its concern for our profession are misplaced and self-defeating, even upon the Court's own premises.

I take it to be uncontroverted that when an accident results in death or injury, it is often urgent at once to investigate the occurrence, identify witnesses, and preserve evidence. Vital interests in speech and expression are, therefore, at stake when by law an attorney cannot direct a letter to the victim or the family explaining this simple fact and offering competent legal assistance. Meanwhile, represented and better informed parties, or parties who have been solicited in ways more sophisticated and indirect, may be at work. Indeed, these parties, either themselves or by their attorneys, investigators, and adjusters, are free to contact the unrepresented persons to gather evidence or offer settlement. This scheme makes little sense. As is often true when the law makes little sense, it is not first principles but their interpretation and application that have gone awry.

Although I agree with the Court that the case can be resolved by following the three-part inquiry we have identified to assess restrictions on commercial speech, *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 586 (1980), a preliminary observation is in order. Speech has the capacity to convey complex substance, yielding various insights and interpretations depending upon the identity of the listener or the reader and the context of its transmission. It would oversimplify to say that what we consider here is commercial speech and nothing more, for in many instances the banned communications may be vital to the recipients' right to petition the courts for redress of grievances. The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures. See, e.g., *Edenfield v. Fane*, 607 U.S. — [113 S. Ct. 1792, 1798] (1993). If our commercial speech rules are to control this case, then, it is imperative to apply them with exacting care and fidelity to our precedents, for what is at stake is the suppression of information and knowledge that transcends the financial self-interests of the speaker.

I

As the Court notes, the first of the *Central Hudson* factors to be considered is whether the interest the State pursues in exacting the speech restriction is a substantial one. Ante, at 5. The State says two different interests meet this standard. The first is the interest

"In protecting the personal privacy and tranquility" of the victim and his or her family. Brief for Petitioner 8. As the Court notes, that interest has recognition in our decisions as a general matter, but it does not follow that the privacy interest in the cases the majority cites is applicable here. The problem the Court confronts, and cannot overcome, is our recent decision in *Shapiro v. Kentucky Bar Assn.*, 486 U.S. 486 (1988). In assessing the importance of the interest in that solicitation case, we made an explicit distinction between direct in-person solicitations and direct mail solicitations. *Shapiro*, like this case, involved a direct mail solicitation, and there the State recited its fears of "overreaching and undue influence." *Id.*, at 475. We found, however, no such dangers presented by direct mail advertising. We reasoned that "[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded." *Id.*, at 475-476. We pointed out that "[t]he relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." *Id.*, at 474. In assessing the substantiality of the evils to be prevented, we concluded that "the mode of communication makes all the difference." *Id.*, at 475. The direct mail in *Shapiro* did not present the justification for regulation of speech presented in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) (a lawyer's direct, in-person solicitation of personal injury business may be prohibited by the State). See also *Edenfield*, *supra*, (an accountant's direct, in-person solicitation of accounting business did implicate a privacy interest, though not one permitting state suppression of speech when other factors were considered).

To avoid the controlling effect of *Shapiro* in the case before us, the Court seeks to declare that a different privacy interest is implicated. As it sees the matter, the substantial concern is that victims or their families will be offended by receiving a solicitation during their grief and trauma. But we do not allow restrictions on speech to be justified on the ground that the expression might offend the listener. On the contrary, we have said that these "are classically not justifications validating the suppression of expression protected by the First Amendment." *Carry v. Population Services International*, 431 U.S. 678, 701 (1977). And in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), where we struck down a ban on attorney advertising, we held that "the mere possibility that some members of the population might find advertising . . . offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity." *Id.*, at 646.

We have applied this principle to direct mail cases as well as with respect to general advertising, noting that the right to use the mails is protected by the First Amendment. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 76 (1983) (REHNQUIST, J., concurring). In *id.*, we held that a statute designed to "shield[] recipients of mail from materials that they are likely to find offensive" furthered an interest of "little weight," noting that "we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." 463 U.S., at 71 (citing *Carry*, *supra*, at 701). It is only where an audience is captive that we will assure its protection from some offensive speech.

See *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 542 (1980). Outside that context, "we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Bolger*, *supra*, at 72. The occupants of a household receiving mailings are not a captive audience, *ibid.*, and the asserted interest in preventing their offense should be no more controlling here than in our prior cases. All the recipient of objectional mailings need do is to take "the 'short, though regular, journey from mail box to trash can.'" *Id.* (citation omitted). As we have observed, this is "an acceptable burden, at least so far as the Constitution is concerned." *Id.* If these cases forbidding restrictions on speech that might be offensive are to be overruled, the Court should say so.

In the face of these difficulties of logic and precedent, the State and the opinion of the Court turn to a second interest: protecting the reputation and dignity of the legal profession. The argument is, it seems fair to say, that all are demeaned by the crass behavior of a few. The argument takes a further step in the amicus brief filed by the Association of Trial Lawyers of America. There it is said that disrespect for the profession from this sort of solicitation (but presumably from no other sort of solicitation) results in lower jury verdicts. In a sense, of course, these arguments are circular. While disrespect will arise from an unethical or improper practice, the majority begs a most critical question by assuming that direct mail solicitations constitute such a practice. The fact is, however, that direct solicitation may serve vital purposes and promote the administration of justice, and to the extent the bar seeks to protect lawyers' reputations by preventing them from engaging in speech some deem offensive, the State is doing nothing more (as amicus the Association of Trial Lawyers of America is at least candid enough to admit) than manipulating the public's opinion by suppressing speech that informs us how the legal system works. The disrespect argument thus proceeds from the very assumption it tries to prove, which is to say that solicitations within 30 days serve no legitimate purpose. This, of course, is censorship pure and simple; and censorship is antithetical to the first principles of free expression.

II

Even were the interests asserted substantial, the regulation here fails the second part of the *Central Hudson* test, which requires that the dangers the State seeks to eliminate be real and that a speech restriction or ban advance that asserted State interest in a direct and material way. *Edenfield*, 607 U.S., at __ [118 S. Ct., at 1800]. The burden of demonstrating the reality of the asserted harm rests on the State. *Id.* Slight evidence in this regard does not mean there is sufficient evidence to support the claims. Here, what the State has offered falls well short of demonstrating that the harms it is trying to redress are real, let alone that the regulation directly and materially advances the State's interests. The parties and the Court have used the term "Summary of Record" to describe a document prepared by the Florida Bar, one of the adverse parties, and submitted to the District Court in this case. See *id.*, at 8. This document includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results. There is no description of the statistical universe or scientific framework that permits any

productive use of the information the so-called Summary of Record contains. The majority describes this anecdotal matter as "noteworthy for its breadth and detail," *ante*, at 9, but when examined, it is noteworthy for its incompetence. The selective synopses of unvalidated studies deal, for the most part, with television advertising and phone book listings, and not direct mail solicitations. Although there may be issues common to various kinds of attorney advertising and solicitation, it is not clear what would follow from that limited premise, unless the Court means by its decision to call into question all forms of attorney advertising. The most generous reading of this document permits identification of 34 pages on which direct mail solicitation is arguably discussed. Of these, only two are even a synopsis of a study of the attitudes of Floridians towards such solicitations. The bulk of the remaining pages include comments by lawyers about direct mail (some of them favorable), excerpts from citizen complaints about such solicitation, and a few excerpts from newspaper articles on the topic. Our cases require something more than a few pages of self-serving and unsupported statements by the State to demonstrate that a regulation directly and materially advances the elimination of a real harm when the State seeks to suppress truthful and nondeceptive speech. See, e.g., *Edenfield*, 507 U.S., at 1113 S.Ct., at 1800-1801.]

It is telling that the essential thrust of all the material adduced to justify the State's interest is devoted to the reputational concerns of the Bar. It is not at all clear that this regulation advances the interest of protecting persons who are suffering trauma and grief, and we are cited to no material in the record for that claim. Indeed, when asked at oral argument what a "typical injured plaintiff get[s] in the mail," the Bar's lawyer replied: "That's not in the record. . . and I don't know the answer to that question." Tr. of Oral Arg. 26. Having declared that the privacy interest is one both substantial and served by the regulation, the Court ought not to be excused from justifying its conclusion.

III

The insufficiency of the regulation to advance the State's interest is reinforced by the third inquiry necessary in this analysis. Were it appropriate to reach the third part of the *Central Hudson* test, it would be clear that the relationship between the Bar's interests and the means chosen to serve them is not a reasonable fit. The Bar's rule creates a flat ban that prohibits far more speech than necessary to serve the purported state interest. Even assuming that interest were legitimate, there is a wild disproportion between the harm supposed and the speech ban enforced. It is a disproportionate the Court does not bother to discuss, but our speech jurisprudence requires that it do so. *Central Hudson*, 447 U.S., at 399-371; *Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

To begin with, the ban applies with respect to all accidental injuries, whatever their gravity. The Court's purported justification for the excess of regulation in this respect is the difficulty of drawing lines between severe and less serious injuries, see *ante*, at 14, but making such distinctions is not important in this analysis. Even were it significant, the Court's assertion is unconvincing. After all, the criminal law routinely distinguishes degrees of bodily harm, see, e.g., United States Sentencing Commission, Guidelines Manual §1B1.1, comment, n. 1(b), (h), (j) (Nov. 1994), and if that delineation is

permissible and workable in the criminal context, it should not be hard to imagine the contours of a regulation that satisfies the reasonable fit requirement. *Ante*, at 14.

There is, moreover, simply no justification for assuming that in all or most cases an attorney's advice would be unwelcome or unnecessary when the survivors or the victim must at once begin assessing their legal and financial position in a rational manner. With regard to lesser injuries, there is little chance that for any period, much less 30 days, the victims will become distraught upon hearing from an attorney. It is, in fact, more likely a real risk that some victims might think no attorney will be interested enough to help them. It is at this precise time that sound legal advice may be necessary and most urgent.

Even as to more serious injuries, the State's argument fails, since it must be conceded that prompt legal representation is essential where death or injury results from accidents. The only seeming justification for the State's restriction is the one the Court itself offers, which is that attorneys can and do resort to other ways of communicating important legal information to potential clients. Quite aside from the latent protectionism for the established bar that the argument discloses, it fails for the more fundamental reason that it concedes the necessity for the very representation the attorneys solicit and the State seeks to ban. The accident victims who are prejudiced to vindicate the State's purported desire for more dignity in the legal profession will be the very persons who most need legal advice, for they are the victims who, because they lack education, linguistic ability, or familiarity with the legal system, are unable to seek out legal services. Cf. *Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 3-4 (1964).

The reasonableness of the State's chosen methods for redressing perceived evils can be evaluated, in part, by a commonsense consideration of other possible means of regulation that have not been tried. Here, the Court neglects the fact that this problem is largely self-policing: Potential clients will not hire lawyers who offend them. And even if a person enters into a contract with an attorney and later regrets it, Florida, like some other States, allows clients to rescind certain contracts with attorneys within a stated time after they are executed. See, e.g., Rules Regulating the Florida Bar, Rule 4-1.5 (Statement of Client's Rights) (effective Jan. 1, 1993). The State's restriction deprives accident victims of information which may be critical to their right to make a claim for compensation for injuries. The telephone book and general advertisements may serve this purpose in part; but the direct solicitation ban will fall on those who most need legal representation: for those with minor injuries, the victims too ill-informed to know an attorney may be interested in their cases; for those with serious injuries, the victims too ill-informed to know that time is of the essence if counsel is to assemble evidence and warn them not to enter into settlement negotiations or evidentiary discussions with investigators for opposing parties. One survey reports that over a recent 5-year period, 68% of the American population consulted a lawyer. N.Y. Times, June 11, 1993, section 3, p. 1, col. 1. The use of modern communication methods in a timely way is essential if clients who make up this vast demand are to be advised and informed of all of their choices and rights in selecting an attorney. The very fact that some 280,000 direct

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mail solicitations are sent to accident victims and their survivors in Florida each year is some indication of the efficacy of this device. Nothing in the Court's opinion demonstrates that these efforts do not serve some beneficial role. A solicitation letter is not a contract. Nothing in the record shows that these communications do not at the least serve the purpose of informing the prospective client that he or she has a number of different attorneys from whom to choose, so that the decision to select counsel, after an interview with one or more interested attorneys, can be deliberate and informed. And if these communications reveal the social costs of the tort system as a whole, then efforts can be directed to reforming the operation of that system, not to suppressing information about how the system works. The Court's approach, however, does not seem to be the proper way to begin elevating the honor of the profession.

IV

It is most ironic that, for the first time since *Bates v. State Bar of Arizona*, the Court now orders a major retreat from the constitutional guarantees for commercial speech in order to shield its own profession from public criticism. Obscuring the financial aspect of the legal profession from public discussion through direct mail solicitation, at the expense of the least sophisticated members of society, is not a laudable constitutional goal. There is no authority for the proposition that the Constitution permits the State to promote the public image of the legal profession by suppressing information about the profession's business aspects. If public respect for the profession erodes because solicitation distorts the idea of the law as most lawyers see it, it must be remembered that real progress begins with more rational

speech, not less. I agree that if this amounts to mere "sermonizing," see *Shapiro*, 486 U. S., at 490 (O'CONNOR, J., dissenting), the attempt may be futile. The guiding principle, however, is that full and rational discussion furthers sound regulation and necessary reform. The image of the profession cannot be enhanced without improving the substance of its practice. The objective of the profession is to ensure that "the ethical standards of lawyers are linked to the service and protection of clients." *Ohrlich*, 486 U. S., at 461.

Today's opinion is a serious departure, not only from our prior decisions involving attorney advertising, but also from the principles that govern the transmission of commercial speech. The Court's opinion reflects a newfound and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients. Self-assurance has always been the hallmark of a censor. That is why under the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence. "[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Kidnfeld*, 507 U. S., at __ (113 S. Ct., at 1705). By validating Florida's rule, today's majority is complicit in the Bar's censorship. For these reasons, I dissent from the opinion of the Court and from its judgment.

BARRY SCOTT RICHARD, Tallahassee, Fla. (GREENBERG, TRAUBER, HOITMAN, LIPOFF, ROSEN & QUENTEL, P.A., WILLIAM F. BIEWS, and JOHN A. DEVAULT III, on the briefs) for petitioner, BRUCE S. ROGOW, Fort Lauderdale, Fla. (BEVERLY A. POHL, HOWELL L. FERGUSON, and LANDERS & PARSONS, on the briefs) for respondents.

Robin / Thought you might enjoy this . . .

PS. Wrs, Asg + KTV want sign ^{or} agree to sign before their meeting later this month
Carlson said he would agree if he ^{money comes from elsewhere} ~~money comes from elsewhere~~

Fairbanks Daily News-Miner, Tuesday, May 9, 1995

SE Intell

1 for \$29 million



Associated Press

—Pablo Picasso's rare blue period portrait of friend, Angel Fernandez de Soto, sold for \$29 million at Sotheby's auction in New York.

Senate GOP fails again on tort reform

The New York Times

WASHINGTON—Republicans in the Senate failed again on Monday to act on a measure intended to reduce the number of civil lawsuits, even though Sen. Bob Dole, the majority leader, had scaled back the proposal drastically to attract the needed votes.

An effort to shut off debate on the legislation, which the Senate has been considering for three weeks, not only failed to win the needed two-thirds majority, but fell short of even a simple majority, with 43 in favor and 49 opposed.

As a result, Senate leaders are planning to take a scalpel to the bill on Tuesday morning to pare it even further. The measure that is expected to emerge would set limits on damages only in lawsuits involving faulty products. That would make it similar to the original Senate bill, which Dole, R-Kan., had sought to expand to bring it closer to the sweeping version passed by the House last month.

Sen. Slade Gorton, R-Wash., predicted that the bill, thus amended, was likely to pass. Sen. John D. Rockefeller IV, D-Vt., who with Gorton has been pressing for national standards in product liability lawsuits, said he thought the measure would attract enough Democrats to be approved on Tuesday.

If the Senate passes even a scaled-back version of the bill, it would still have to be negotiated with the House measure to come up with a final version.

The past two weeks of heated debate and negotiation over this issue have provided a stark demonstration of how the Senate's majority Republicans are a far less potent force in their chamber than is the Republican majority in the House. The Senate Republicans, and especially Dole, have been frustrated in their efforts to move quickly with the kind of major legislation that their Republican counterparts in the House have been able to pass.

Dole, who attacked the Republican presidential nomination, took a gamble on brokering the Senate measure to stall the House version. He apparently did not have a clear idea of the depth of his support, however, a miscalculation that is the equivalent of a trial lawyer's asking a question of a witness without knowing the answer.

"He didn't really know how many votes were there," a senior Senate staff aide said. "He just wanted to

test the waters."

The House last month passed bills that would set limits on punitive damages in all civil lawsuits in both federal and state courts.

But the more lawyer-friendly Senate was expected to balk at such sweeping changes, and it began considering a more modest proposal. That bill, sponsored by Gorton and Rockefeller, would have set limits on punitive damages only in lawsuits involving faulty products, for items as diverse as ice-cream makers to artificial limbs. Dole, however, expanded the measure to match much of the House legislation.

Last Thursday, as President Clinton accused the Senate of planning to enact a measure that would protect rapists, drunken drivers and child abusers, senators refused to go along with Dole's sweeping changes. Dole's effort to halt debate then also failed to attract even a simple majority.

On Friday, Dole and other Republicans scaled back the measure to limit punitive damage awards in product liability lawsuits; but they added language that would limit damages in all civil lawsuits involving small companies and individual whose net worth did not exceed \$200,000.

It was this measure that could not attract enough votes to end the debate again on Monday.

Before Monday's vote, Dole had given his approval to scale back the bill further, conceding that the version he produced Friday would not win.

The bill to be considered on Tuesday would limit punitive damages a jury may award someone in a product liability lawsuit to whichever is greater, \$500,000 or twice the amount of damages for lost wages, medical expenses, and "pain and suffering." Punitive damages may be awarded by juries in especially outrageous circumstances. The bill would also allow a judge to remove that limit under certain circumstances, including those in which the conduct of the manufacturer was especially heinous.

Richard Brandon, a lobbyist for several consumer groups, said that the provision was largely meaningless because under the bill a company that objected to a judge's removing the limit could demand and be granted a new trial. Brandon said that no successful plaintiff would want to risk a second trial against a large company.

Tony nominations

"Show Boat."

who plays Norma in "Show Boat," a lead actor of "Show Boat" for best actor. Derick, as a young man, the corporate to succeed, leads contenders for best of his challenges. "Show Boat" by Tom and John.

Jean-Claude's boat a dysfunction, so received nine including best play. "Arcadia" by Tom and John. "Love, Valour" by Terrence

McNally.

Four of the five performers in "Indiscretions" were nominated for acting awards.

Eileen Atkins, the love-starved spinster of "Indiscretions," received a nomination for best actress and will compete against Mary Alice of "Having Our Say," Cherry Jones of "The Heiress" and Helen Mirren of "A Month in the Country." Atkins' co-star, Helen Turner, was not nominated.

Ralph Fiennes, the star of "Hamlet," was nominated for best actor and faces Roger Rees of "Indiscretions." Brian Bedford of "The Mollere Comedies" and Joe Sears of "A Tuna Christmas."

The Tony nominations were made by a 17-member panel of theater professionals. The winners will be announced June 1.

RECEIVED MAY 10 1995

HOGAN, MECHAM, RICHARDSON AND COMPANY
CERTIFIED PUBLIC ACCOUNTANTS

1734 TONGASS AVENUE
KETCHIKAN, ALASKA 99901
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Partners

1 Pete Hogan, CPA
Edward B. Mecham, CPA
5 Dirk Richardson, CPA

A Member of the
AICPA Private
Company Practice
Section

May 8, 1995

Senator Robin Taylor
Senate Judiciary Committee
Alaska State Capital
Juneau, AK 99801

Dear Senator Taylor:

I am writing in regard to House Bill 158 which would revise the Civil Liability statutes of the State of Alaska. I understand that HB158 is presently being reviewed by the Senate Judiciary Committee. I request that you send the bill to the floor of the Senate for prompt action. I further ask that if any amendments are proposed to the bill, you do whatever you can to retain Section 12 of the bill intact. That Section is designed to bring fairness to the imposition of liability against parties who have had only a small part in an action resulting in awarded damages. Many other states have recognized the need for such fairness and have revised their statutes to provide that fairness. I am asking that you help your colleagues in the Senate pass this bill and provide Alaskans with fairness also.

Sincerely,



Edward B. Mecham, C.P.A.
Partner

RECEIVED MAY 10 1995

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Company Practice
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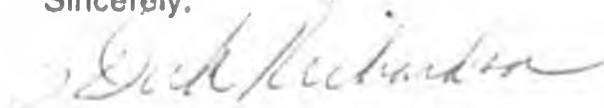
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Sincerely,



S. Dirk Richardson, CPA
Partner

SHAFFER & HARRINGTON

Certified Public Accountants

479 Kotlian Street, Suite Three Sitka, Alaska 99835 (907) 747-6984 Fax (907) 747-5988

May 11, 1995

Senator Robin Taylor
Senate Judiciary Committee
Alaska State Capital
Juneau, Alaska 99801

VIA FAX (907) 465-3922

Dear Senator Taylor,

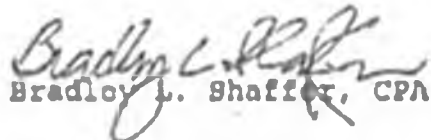
I respectfully request your support of CSHB 158. I feel the legislation is in the best interest of the State of Alaska.

If I recall correctly, you were an active supporter of limited liability/tort reform for the Forest Products industry as it relates to EPA violations. CSHB 158 will have a far greater impact on business and individual rights than what you supported in the past.

I urge you to inform the constituents of our District. This is very important legislation and most Sitkan's are not aware of your present position or the significant changes proposed for Alaska State Law.

Tort Reform has been a national priority for years. I am a member of the Alaska State Board of Public Accountancy. Significant numbers of Alaska firms are waiting for Alaska limited liability legislation. Many of the National Firms practicing in Alaska have already organized under different State law for limited liability protection.

Sincerely,


Bradley L. Shaffer, CPA

SHAFFER & HARRINGTON
Certified Public Accountants

THE NATIONAL
LAW JOURNAL

ALSO IN THIS SECTION

IN FOCUS Pages B9-B18

FAMILY LAW Gay parents' custody battles; gender-based violence
LAW OFFICE MANAGEMENT
Planning partners' retirements

UPDATE Page B21

TAX LAW Cases on Arkansas sales tax, cigarette taxes in Indiana, real estate tax appeals and assessments based on groundwater pollution

COURT DECISIONS Page B22

■ U.S. Supreme Court
■ U.S. Circuit Courts of Appeals
■ State Supreme Courts

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Real Estate B31
Great Escapes B31

Business Watch

MONDAY, MAY 1, 1995

SECTION B

CITE: THE NEW YORK LAW JOURNAL CO.

No Growth
In Tort Cases
For Six YearsStudy's findings are at odds
with Republican rhetoric.

By HARVEY BERKMAN

NATIONAL LAW JOURNAL STAFF REPORTER

AFTER INCREASING by nearly one-third between 1984 and 1986, the number of tort filings in state courts remained stable for six years before falling slightly in 1993, and in federal court the number has been stable for a decade, according to a study by the U.S. Department of Justice.

The study, released by Justice April 13, also shows that medical malpractice and products liability suits made up a small percentage of all state tort cases completed in the fiscal year ending June 30, 1992.

The study's findings are at odds with the perception purveyed by Republicans in Congress who contend that the number of tort cases, particularly products liability suits, has skyrocketed.

According to the study, medical malpractice and products liability suits made up 8.3 percent of 378,000 tort cases completed in state courts in the nation's 75 most populous counties in 1992. Auto and premises liability suits represented three of every four tort cases completed.

The time of disposition varied by tort type. The quarter-million auto cases ended in a mean of 16.7 months, with only one out of five taking more than two years. The 31,400 products liability and medical malpractice cases took 25 to 26 months on average to resolve, with roughly two out of five taking more than two years.

Medical malpractice cases were also the most likely to reach a verdict: 6.9 percent did so, compared to 2.9 percent for tort suits overall. One possible reason: Defendants won 74 percent of medical verdicts, compared with just under half of the premises liability suits and a third of the auto cases. □

Oil Manufacturers Clash
Over Mandated Calif. Gas

Six companies say Unocal Corp.'s patent for clean gas is invalid because all seven helped to develop the formula.

By ANDREW BLUM

NATIONAL LAW JOURNAL STAFF REPORTER

IN A CASE in which state regulations meet patent law, six major oil companies have sued Unocal Corp., alleging that it has created a monopoly with an invalid patent for a reformulated gasoline which California law mandates for the state.

The six—Atlantic Richfield Co., Chevron U.S.A. Inc., Exxon Corp., Mobil Oil Corp., Shell Oil Products Co. and Texaco Refining and Marketing Inc.—allege in a suit filed on April 13 that Unocal essentially did an end run around the other companies in obtaining a patent for a product that had been developed by a consortium of all seven. If Unocal is allowed to charge a license fee to the companies, it will reap \$80 million a year,

they say. Atlantic Richfield Co. v. Unocal Corp., 95-2379 RG (C.D. Calif.).

The companies' suit argues that the patent is invalid because the RFG fuels "were not invented by Unocal, are in the public domain and cannot be part of any valid and enforceable patent, and, therefore, Unocal has no legal right to demand that plaintiffs pay license royalties."

The companies are seeking a declaratory judgment to invalidate Unocal's patent, which they claim they only learned of through a Unocal statement about the patent for California Phase 2 RFG released Jan. 31. Under California regulation, the gas, designed to reduce auto emissions, must be produced and ready for the market by March 1996. To meet the mandate, oil producers have spent

[SEE "GAS" PAGE B2]



Defiant Advantage? With its patent, Unocal asserts the rights to the low-emissions gasoline that California has mandated to be sold in the state starting May 1, 1996.

BUSINESS NEWS INDEX

Deal of the Week: The attorneys behind the \$2 billion purchase of Kemper Corp. Page B2

Counsel Moves: Princeton, N.J.'s American Re Corp. names Robert K. Burgess as senior vice president, general counsel and secretary. Page B2

Newsline: In February, Stratton Oakmont Inc., a brokerage firm, argued to a federal judge in Washington, D.C., that forcing it to comply with measures recommended by an independent consultant would put it out of business. Now Stratton says five states are trying to revoke or suspend its license. Page B2

Court Watch: The latest federal appeals court rulings on antitrust law, insurer's liability, the Clean Air Act and the Age Discrimination in Employment Act. Page B3

Columnists: Jonathan G. Blattmachr and Harry H. White examine H.R. 981, a bill designed to close the loophole that permits Americans to avoid tax liability by renouncing their citizenship and reestablishing abroad. Page B4

Guest Columnists: Theodore J. Theophilos, Katherine L. Adams and Gary D. Mitchell, of the New York office of Chicago's Sidley & Austin, discuss the D.C. Circuit's invalidation of the EPA's lender-liability rule and the inconsistent case law governing CERCLA liability as a result of the rule's demise. Page B5

BUSINESS ELSEWHERE

Premier's Problem: Sen. Larry Pressler has led the effort to draft a 144-page telecommunications reform bill, but will the Baby Bells move to derail it? Page A1

The Senate's Turn: A number of leading Democratic senators intend to delay a lengthy debate when the Senate takes up product-liability legislation, the first tort bill on the upper chamber's floor since the 1990s passed its sweeping legislation in March. Page A1



H.C. PRICE CO.

301 W. Northern Lights Blvd., Suite 300
Anchorage, Alaska 99503
(907) 278-4400 • Fax (907) 278-3255

May 8, 1995

Via Fax: 465-3922

Alaska State Legislature
State Capitol (MS 3100)
Juneau, AK 99801-1182

Attn: Senator Robin Taylor

Subject: HB 158 Tort (Liability) Reform

Dear Senator Robin Taylor;

I strongly support the passage of tort reform as represented in HB 158. This bill addresses the need to reduce costs associated with the Civil Justice system, match losses with compensation, and create equitable distribution of the cost and risk of injury.

These and other changes contained in HB 158 will begin the process of reducing out-of-control and unnecessary costs associated with business liability.

Please support this important legislation by voting for passage of HB 158.

Very truly yours,

H. C. Price Co.


Wesley P. Nason
Vice President

WPN/KLL/rd/294

PETRO MARINE SERVICES

Petroleum Marketing to the Marine Industry

RECEIVED MAY 13 1995

May 9, 1995

Sen Robin Taylor
Room 30
Alaska State Capitol
Juneau, Alaska 99801-1182

Dear Sen Taylor,

I am writing to you in your role as the Chairman of the Senate Judiciary Committee to inform you of my strong support for House Bill 158, a bill aimed at tort reform. This bill would reduce costs associated with the civil justice system, match losses with compensation and create equitable distribution of the cost and risk of injury, as well as focus on other necessary areas of reform.

I am sure you are very familiar with this bill, and instead of reiterating its details, I would like to briefly describe my concerns about our legal system. To be candid, it's out of control. I speak as an entrepreneur who has built a very small business into one of Alaska's larger businesses. I take considerable pride in the service we provide and the fact that I have been involved only once in 35 years of business as a defendant in a lawsuit. We're far from finished. When we complete the purchase of White Pass facilities in Southeast Alaska and the Yukon Territory, our annual revenues are expected to top \$200 million a year.

Our company, and many others like us, however, face numerous challenges and among the most onerous is a legal system that seems to make victims out of innocent parties who may just happen to be the target of spurious lawsuits. We seem to have thrown out the idea of moral right and wrong in favor of a system that rewards those who endlessly make the most outrageous demands.

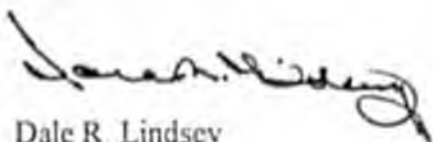


I am certainly not in favor of a system without reasonable controls and in which "anything goes." In fact, we need protection from those with a litigious mentality as much as the next person. I strongly support bringing some realism back into the legal system and doing whatever is appropriate to reduce the number of frivolous lawsuits filed by irresponsible plaintiffs.

House Bill 158 will not solve all these problems. It is relatively narrow in that it generally would begin the process of limiting certain damages, as well as attorney fees. Part of the reason I so strongly support it is that it has taken us so many years just to get to this point. If passed, this bill would send a clear message to the legal system that we all must be held more accountable for exercising poor judgment. For example, by ensuring that in suits involving the fault of more than one person awards would be allocated in accordance with their fault, we would take a significant step forward by curtailing the feeding frenzy that results from attorneys seeking out all the "deep pockets" they can find.

That is just one example, and as I said, there is no need to go over the entire bill because I am confident you are familiar with it. Instead, I will simply and respectfully urge your support for House Bill 158. I appreciate your time and consideration on this important matter.

Sincerely,



Dale R. Lindsey
President & CEO

PETRO MARINE SERVICES

Petroleum Marketing to the Marine Industry

Oregon Health Plan faces threat

■ The governor says cuts in Medicaid proposed by the GOP might kill the state's innovative program

By RICHARD L. HILL
of The Oregonian staff

The Oregon Health Plan probably wouldn't survive the amputation of Medicaid funds proposed by congressional Republicans.

Gov. John Kitzhaber made that prognosis Wednesday in response to a bill by House GOP leaders that aims to cut \$182 billion from Medicaid by 2002.

Passage of the bill would result in an immediate 15 percent cut from the state's Medicaid services, he said, and "virtually ensure that the Oregon Health Plan will not continue."

The plan, which provides health care to the poor, would lose \$230 million in

funding in the next two years and more than \$2.6 billion in the seven-year time frame of the proposal, said Kitzhaber, who was the plan's main architect when he was state Senate president.

At a press conference, Kitzhaber said that 130,000 poor Oregonians now have primary basic health care who didn't have it two years ago, before the health plan went into effect.

He and other supporters said that by providing basic care to more people, the health plan has helped shrink welfare rolls and reduced costly hospital emergency room care.

The health plan, passed by the 1989 Legislature and launched in 1991, is

the state's answer to rising medical costs and shrinking access to treatment. About 400,000 Oregonians are on Medicaid rolls, an increase of about 50 percent, from before the plan was fully in place this year.

Members of Oregon's congressional delegation vowed Wednesday to seek changes in the bill, which is being considered this week by the House Commerce Committee.

Rep. Ron Wyden, D-Ore., who sits on the committee, said he would propose an amendment Thursday to protect Oregon and a few other states that have innovative Medicaid programs in place.

"This bill tears the heart and soul

out of Oregon's initiative," Wyden said. "But we're in a very, very uphill battle in the committee."

Wyden said he would encourage President Clinton to veto any bill that threatens the Oregon Health Plan.

Rep. Jim Bunn, R-Ore., said the bill would be "a disaster" for Oregon in its current form. Bunn said he would offer an amendment to help protect the Oregon Health Plan when the bill reaches the House floor in early October.

"I'm working with the leadership on this," Bunn said. "They have to under-

Please turn to
HEALTH, Page C7

Health: Bunn vows to defend Oregon plan

■ Continued from Page C1

stand Oregon's situation — that we have already through efficiency cut costs drastically. As it stands, this plan would punish Oregon for leading the way in reforming health care."

Medicaid is a federal-state health program for 36 million poor Americans. The federal government pays 62 percent of the cost, while the state pays 38 percent.

Because the Medicaid program involves federal funds, it must meet certain federal standards. So Oregon had to acquire federal waivers from Medicaid regulations before its program could begin.

The House GOP plan would allow Oregon to continue with its experiment with managed care, but with less money. The proposal, which is aimed at slowing the national rate of Medicaid's annual growth from about 10 percent to 4 percent, would replace Medicaid with block grants to states.

Jean I. Thorne, Oregon's Medicaid director, said the problem with the Republican plan is it involves a formula that uses Medicaid cost figures from fiscal year 1991 — Oct. 1, 1991, to Sept. 30, 1994 — before the Oregon Health Plan was fully implemented.

"In fiscal 1995, we had a one time, 27 percent growth in Medicaid costs because that's when we brought in 130,000 Oregonians," Thorne said. "Then we're expecting another 9 percent increase in fiscal '96 — so that's a 36 percent increase."

The Republican plan would give the state about a 14 percent increase for fiscal 1996 over fiscal 1991.

"I think we would be hurt worse than any state because of the growth that we had in our one year start-up," Thorne said.

Kitzhaber said, "Perhaps the most outrageous aspect of this proposal is that it paralyzes Oregon because of our efficiency."

He pointed out that Oregon's per capita Medicaid costs are among the lowest in the nation at \$1,800, "well below the national average of \$1,900." Oregon ranks 36th in individual Medicaid spending.

"But states like New York that spend in excess of \$8,000 per capita will actually be rewarded for their inefficiency and for their unwillingness to address this problem," he said.

Kitzhaber said he would have to call a special session of the Legislature to deal with the \$230 million potential loss to the state if the House bill gets through Congress. Senate Republicans still are working on their Medicaid plan.

The Oregon Health Plan resulted in the state's welfare rolls being cut 8 percent last year, and another 12 percent reduction is anticipated for 1995-96, Kitzhaber said.

In the first 12 months of the Medi-

caid plan's expansion, Oregon's hospitals also reported a 30 percent decline in charity care, he added.

Kitzhaber said Congress should take into consideration Oregon's population growth rate, which is forecast to be 8.4 percent for 1995-2000 — the 10th highest in the nation. He said Oregon also ranks 14th in the percentage of its population age 65 and older, people most likely to need Medicaid-funded long term care.

Kitzhaber planned to travel soon to Washington, D.C., to urge Congress to change the Republican proposal. "The primary effort will be focused on trying to get an exemption for those states that have been granted Medicaid waivers" for their programs, he said.

Dr. James K. Lacey, a Salem pediatrician, said members of the Oregon Pediatric Society and the Oregon Medical Association were "deeply disturbed by the proposed cuts."

Insurance firms seek large rate increases

BY KERY MURAKAMI
Seattle Times Olympia bureau

OLYMPIA — Just months after health-care reform died in the state Legislature, insurance companies are requesting double-digit rate increases — and reviving the debate over how, or whether, to control spiraling costs.

Pierce County Medical is asking for a 34 percent premium increase for policies bought by individuals. Blue Cross of Washington & Alaska has asked for a 19 percent increase for individual policyholders.

State Insurance Commissioner Deborah Senn has already approved a 22 percent rate increase for Medical Services Corp. in Eastern Washington and a 14.2 percent boost for King County Medical — both for individuals.

Supporters of the Legislature's 1993 Health Care Reform Act say they were right earlier this year when they predicted large rate increases if the reforms were repealed.

But some conservatives blame the few parts of the 1993 act that survived, such as requiring insurance companies to insure people with pre-existing conditions.

They say the rate increases show reform should be scaled back further.

"Before, companies turned the sickest people away," said Julie Pisto, Pierce County Medical spokeswoman. "Suddenly, the doors are being opened, and people are coming on with serious conditions."

Pisto said the company estimates it will lose \$9 million this year because it is paying out more claims.

Because many group plans were already open to people with pre-existing conditions, it is the individual insurance buyers with serious problems who are driving up costs, she said.

Senn said rate-increase applications from insurance companies show a number of other factors are driving up costs, including "some bad investments by some of the companies."

She and Democratic legislators, among them Senate Health Committee Chairman Kevin Quigley of Lake Stevens, said regardless of the reasons for rising rates, several health-care reforms the Legislature killed this year would have kept the increases modest.

The reforms would have lumped people in the same age groups together when setting insurance rates, spreading the cost of those with pre-existing conditions among a large group of people.

When that idea died, Quigley

PLEASE SEE *Rate* ON B 2

Insurers seeking double-digit rate increases; critics say demise of health reform is to blame

Rate

CONTINUED FROM B 1

and other legislators tried to lump individual policyholders together with small businesses to spread the costs.

But small businesses balked, and House Republicans and Gov. Mike Lowry negotiated a deal that put individuals in their own pool.

The Legislature also removed a provision of the 1993 reforms that limited how much insurance rates could rise. Small businesses and such Republican opponents of the 1993 reforms as Rep. Philip Dyer, R-Issaquah, called the premium cap "government-imposed price fixing." Dyer, who chaired the House Health Care Committee, business groups, and the insurance industry said market competition would keep rates down.

Insurance companies, for the most part,

did not ask for large rate increases the past two years.

But Quigley and Senn say it was the pressure of the health-care reforms that kept rates low and that now, with the pressure lifted, insurance rates are skyrocketing.

"The insurance industry was working to defeat the reforms, saying let the free market work. Now they turn around and give people the whammy," said Sen. Rosa Franklin, D-Tacoma, whose district encompasses many of the 20,000 people affected by Pierce County Medical's rate increase. Franklin wants insurance companies to explain themselves Friday at a meeting of the Senate Health and Long-term Care Committee.

Dyer, though, said the rate increases are the cost of opening insurance to more people. Spreading the cost to small businesses would discourage them from insuring their employees, he said.

BREAD & CIRCUSES

YOU have to hand it to Senate Republicans. It doesn't seem possible that anyone could take on high-priced trial lawyers in a political fight and lose, but they managed it.

The political fight in question is over tort reform, and the frustration is that a popular conservative reform can find no support. Michael J. Horowitz is a veteran of Washington's wars—he served as President Reagan's first-term OMB General Counsel and also co-chaired his Cabinet Council's working group on legal reform. Now a senior fellow at the Hudson Institute, he has a plan that delivers on a key plank of the Contract with America, it would cut the income of Bill Clinton's favorite trial lawyer constituency by 50 per cent and slash auto-insurance premiums by \$26 billion. It's intelligent, populist conservatism, and it's even bipartisan. Horowitz's tireless promotion of "Consumer Payoff Tort Reform" has led to endorsements ranging from Robert Bork to former ACLU President Norman Dorsen, from the *Wall Street Journal* to Anthony Lewis. Big city mayors, consumer groups, and the NFIB all support it. Unfortunately, not enough Republicans in Congress do.

Here's the scandal. Lawyers pocket an estimated 60 cents of every dollar spent in the tort system. Horowitz has two proposals to deliver a far larger share of tort awards to injured parties than to their lawyers. Under the first, the enrichment of lawyers who drag out litigation would be eliminated by encouraging defendants to make early settlement offers. Should an offer be accepted, the plaintiff's lawyer's fee would be limited to capped hourly charges; if rejected, contingency fees could be charged only against recoveries in excess of the offer. Both sides would thus reduce their costs, and lawyers no longer profit out of all proportion to the risk they assume; they

would be compensated only for the value they add. "Simple and ingenious," declares Derek Bok, a former dean of the Harvard Law School.

The second proposed reform Horowitz is only too happy to credit to its original 1984 sponsor—Dick Gephardt (who now opposes tort reform). Suppose defendants agree early on to reimburse claimants for all the uninsured economic costs of their claims—past and future. If the offer is accepted, the transaction costs in these undisputed cases would be effectively eliminated; if rejected, plaintiffs would face a higher burden of proof for noneconomic damages (pain and suffering, etc.). The overall effect would be to reduce malpractice, auto, and comparable insurance rates by an estimated 20 to 40 per cent. And because pain and suffering awards are generally figured to be triple the economic damages, the Gephardt plan would sharply reduce the incentive to make innumerable doctor's visits in order to drive awards up. This is not trivial. FBI Director Louis Freeh recently estimated that American households pay over \$200 annually in higher health-insurance premiums owing to tort-related health care fraud. And most of the money goes eventually to pay legal fees.

Horowitz would also permit motorists to drop coverage for pain and suffering, thereby cutting their auto insurance rates by a third. According to a Rand Corporation study, California drivers alone could enjoy \$3.6 billion annually in premium savings.

Better yet, these reforms split the liberal coalition by clearly favoring injured plaintiffs at the expense not of defendants but of their lawyers. This is a wedge issue—and a sweet one. The tort bar's political contributions helped elect Bill Clinton. And the *quid* for that *quo* was not long in coming: his health care proposal last year would have permitted lawyers to continue re-

ceiving windfall profits from protracted malpractice litigation. If Republicans can now force him to choose—either defend greedy lawyers or enrage his most generous supporters—he will be in a nice fix.

Greedy lawyers were not the target when tort reform was debated inside the Beltway. Last March, Horowitz watched dispiritedly as the tort-reform debate developed into the usual media psychodrama: the Republicans taking rights away from injured consumers by capping damage awards so that their big-business buddies could maim on the cheap while Democrats looked out for the interests of the little guy.

Even so, with the help of some Democratic defections, the House passed both product-liability reform and a broad tort-reform measure covering medical malpractice claims. But the product-liability reform that passed the Senate was more modest, and general tort reform languished altogether there. Now, the expectation is that while both Houses will agree on a product liability bill of some kind, the present wasteful and costly tort system will remain largely intact—unless there is a new approach that changes the terms of debate.

The basic political problem, Horowitz believes, is that the cap on pain and suffering awards (which the Senate refused to adopt) is too easily caricatured as taking rights away from consumers with no visible payoff. Freshman Senator Fred Thompson of Tennessee said that he couldn't—and wouldn't—explain such a limit to the parents of a severely injured child.

Fortunately, a few Republicans can recognize a good thing when they see one. The Horowitz "early offer" reforms and his auto-insurance "consumer choice" plan (all of which states can opt out of) have been combined in a bill co-sponsored by Senators Mitch McConnell and Spencer Abraham. In the House, Chris Cox and David McIntosh are promoting the same reforms. If they can persuade their colleagues of their merits, every insured American could receive a "litigation tax" break, courtesy of the new Republican majority, before next year's elections.

Bill Clinton would then have a major fight on his hands with the tort bar. If he can't stop tort reform, maybe they'll sue. It's an open-and-shut case of breach of promise. —KATE O'BRIEN



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FAX: (907) 274-1729

August 25, 1995

Mr. Joe Ambrose
Chief of Staff, Sen. Robin Taylor
352 Front Street
Ketchikan, AK 99901

Re: The Narrows Alaska Supreme Court Brief

Enclosed are the first 58 pages of the captioned subject
being sent to you as in accordance with Mr. Clark's
instructions.

Very truly yours,
LAW OFFICES OF MURPHY L. CLARK

Nancy Kortling

Nancy Kortling

ink

DIVISION OF LEGAL AND RESEARCH SERVICES

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Juneau, Alaska 99801-2105

SEP 14 REC'D/KTD

MEMORANDUM

September 11, 1995

SUBJECT: Punitive damage awards (Work Order No. 9-LS1256)

TO: Senator Robin Taylor
Attn: Joe

FROM: Michael F. Ford
Legislative Counsel

You have asked for a review of Alaska Supreme Court opinions in which the court has examined punitive damage awards. The following are those cases since the Strum, Ruger & Co. decision in which the court has reviewed this issue. In general, the lower court awards of punitive damages have been upheld.

1. Clary Ins. Agency v. Doyle - 620 P.2d 194 (AK 1980). In this case an award of \$190,000 in punitive damages was upheld. There were no compensatory damages, but the plaintiff was successful in requiring the defendant to act as insurer for the plaintiff in a worker's compensation case.
2. Ben Lomond, Inc. v. Campbell - 691 P.2d 1042 (AK 1984). In this case the plaintiff was awarded \$13,000 in compensatory damages and \$50,000 in punitive damages. The court upheld both awards and specifically mentioned that the ratio between punitive and compensatory damages of 2.38:1 was reasonable.
3. AK Village, Inc. v. Smalley - 720 P.2d 945 (AK 1986). In this case the court upheld awards of \$235,000 in compensatory and \$550,000 in punitive damages. Again the court found that a reasonable relationship existed between the two awards.
4. Pletnikoff v. Johnson - 765 P.2d 973 (AK 1988). In this case the court reversed an award of \$1,000,000 in punitive damages. The reversal was required because the Supreme Court also reversed on the underlying issue of liability. In reversing the lower court the Supreme Court concluded that because the issue of punitive damages was intertwined with the issue of liability, reversal on the punitive damage award was also required.

Senator Robin Taylor
September 11, 1995
Page 2

These are the only cases I found in which the issue of the award of punitive damages was an issue. As you are probably aware, there may be quite a few more cases in which the award of punitive damages is reduced by the trial judge and not by the appellate court.

Please contact me if you have further questions.

MFF:lmb
95-254.lmb

DATE: AUGUST 14, 1995

TO: THE HONORABLE ROBIN TAYLOR
CHAIRMAN, JUDICIARY COMMITTEE

FROM: CATHY CRAWFORD
ASSOCIATE BROKER *Cathy Crawford*

PHONE: 789-5099

FAX: 789-0054

RE: PUBLIC HEARINGS ON TORT REFORM, HB 158

This memo is regarding the above HB 158. I have not read the bill, but have heard some of the input. I certainly do agree that we need to have changes made.

I, personally, am in danger of having my real estate license suspended for three months. The reason was the lending institution relied on an engineer's phone call regarding a report he made to her and turned down a loan; the Buyer relied on the lending institution's suggestion. HOWEVER, when we gave testimony the engineer testified that he did not like the Seller and wanted to sour the deal so he lied to the lending institution.

Our attorney has the engineer's statements taped in his deposition and also when he was testifying at the hearing. When the commission met, these facts were disregarded, and although I was trying to consummate this transaction in a happy ending, this is what I am facing.

This is the sort of thing that happens to real estate people. The Good Lord knows that there are enough things that can go wrong, and we certainly do not need any help from other people. As far as I am concerned, this was a frivolous law-suit and should never have even been brought to a hearing when the Real Estate Commission knew in advance that the Engineer lied to make the deal fall through.

If you are interested in learning more about this case, I will be glad to talk with you. These sorts of things go on all the time, but it seems that there is nothing that real estate people can do to protect ourselves. If we do something wrong, then we should answer for it. But the frivolity, vindictiveness of persons surely does make it a hardship for us.

I therefore am urging this HB 158 to be passed. Even if it cannot protect me, it surely will protect other small business.

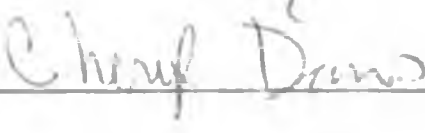
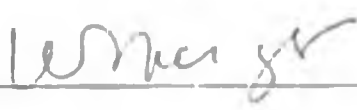
Thank you for letting me speak my mind.

cc: Thyes Shaub, State Director

JUDICIARY COMMITTEE
DELIVERY ACCEPTANCE LOG

MEETING DATE 2/9/96

BILL NUMBERS HB 158

LEGISLATOR	ACCEPTED BY	TIME	DATE
SEN. GREEN. RM 423			
SEN. MILLER. RM 125			
SEN. ADAMS RM 417			
SEN. ELLIS RM 9			

*A Report
on the Impact of House Bill 158
on Injured Alaskans*

Prepared by:

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MARCH 1995

SUPPORTING DOCUMENTS

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INTRODUCTION

In Alaska, certain groups recognize that they would profit if our jury system of damages for civil wrongs (torts) were significantly limited. Their solution is two pronged. Keep victims out of court, by locking the courtroom doors or by making claims too risky. Handcut the jury so that it cannot award full compensation. Naturally, it is necessary to justify this solution in noble sounding policy goals.

House Bill 158 begins with a statement of high sounding goals, and then slashes away at the jury system. Every section takes from the victim, and gives to the wrongdoer. In this sense House Bill 158 could be termed the "Wrongdoer's Relief Act of 1995".

This report will briefly examine the erroneous premises behind the legislative findings and goals in Section One of the bill. Then, each infringement on our jury system will be analyzed in plain English, so that the proposed transfer of rights, power, and money from the victims to the wrongdoers can be more clearly seen for what it is.

SECTION 1 LEGISLATIVE FINDINGS

A. THE JURY SYSTEM AND VICTIMS NEED STILL MORE OF THE LEGISLATIVE LASH, FOR THE GOOD OF SOCIETY.

Implicit throughout this "findings and purposes section" is the premise that the transfer of power from victims to those accused of wrongdoing which has occurred in Alaska over the past twenty five years does not go far enough. What follows is a synopsis of tort reform already on the books.

1. Doctors accused of medical malpractice are entitled to an immediate stay of discovery against them. They proceed to a hearing before their professional colleagues. The opinion of these colleagues is admissible in evidence at trial. A.S. 09 55 536. There is no requirement of impartiality; members of the panel may be rabidly opposed to injury claims. Indeed, one panel recently refused to find an orthopedic surgeon guilty of medical malpractice for performing a surgery on his patient's wrong knee.

2. In medical malpractice litigation, the court may order periodic payment of the judgment. A.S. 09 55 548.

3. Lawsuits may not be brought for injury, death, or property damage caused by construction defects more than fifteen years old. A.S. 09 10.055.

4. Punitive damages may only be awarded upon proof by clear and convincing evidence, a higher than normal standard. 09 17 020.

5. Wrongdoers in Alaska are not jointly liable. A.S. 09 17.080. This is a very significant change in the law which puts Alaska in a distinct minority of American jurisdictions. This law ended what is popularly known as "deep pocket" liability, and puts the risk of insolvency by one or several wrongdoers on the victim alone.

6. Non-economic damages are limited to \$500,000, except in cases of disfigurement or severe physical impairment. A.S. 09 17 010.

7. Damage awards are reduced by collateral benefits not subject to subrogation (payback to the victim's insurer). A.S. 09 17 010.

8. Municipalities are not liable for negligent failure in conducting safety inspections. A.S. 09 65 070.

- 9 Social hosts are never liable for furnishing liquor to other adults. A.S. 04.21.020
- 10 Bar and liquor store owners are not liable for sales to minors made in good faith reliance on identification; criminal negligence must be shown. A.S. 04.21.020, 052.
- 11 Bars and liquor stores are not liable for selling to drunks or allowing them to remain on premises, unless criminal negligence is proven. A.S. 04.16.030
- 12 Ski operators are not liable for ski accidents caused by the inherent risks of skiing. A.S. 05.45.010.
- 13 The State is not liable for its oil spill response absent gross negligence. A.S. 46.08.150
- 14 Oil spill contractors are not liable for property damage absent gross negligence. A.S. 46.05.825
- 15 No damages can be awarded to a person injured while in the commission of a felony. A.S. 09.65.210.
- 16 An owner is not liable for death or injury occurring on unimproved land. 09.65.200
- 17 Real estate agents are not liable for mistaken information they innocently pass on to buyers. A.S. 09.65.230
- 18 Members of non-profit boards are immune for their torts. A.S. 09.65.170.
- 19 A person rendering emergency aid cannot be sued. A.S. 09.65.90.

Unsatisfied with these special protections for negligent actors, the drafters of House Bill 138 seek further erosion of our jury system.

B. THE SKY IS FALLING: INSURANCE.

Also implicit in the legislative findings is the notion that society faces an intolerable insurance crisis. Insurance is now generally available and well priced. (Deborah Ballen, Vice President, American Insurance Association, testimony before U.S. Senate Subcommittee, April 5, 1989.) The real cause of the "insurance crisis" of the 1980's was the insurance industry's reliance on flawed investment strategies based on the high interest rates of the late 1970's.

See "The Manufactured Crisis: Liability Insurance Companies Have Created a Crisis and Dumped It On You", Consumer Reports (August 1986). Notably, the State of Alaska joined nineteen other states in an antitrust case against various insurance companies for manipulating the market to artificially restrict coverage in select areas.

The major insurance problem facing Alaskans is the high price of insurance coverage for obstetrical practitioners in rural communities. This problem can only be solved by addressing it head on. It cannot be solved by tinkering with the tort system in general, and hoping that the effects will eventually trickle down to bush doctors who deliver babies. To date, the medical community and the legislature have shown no interest in specific solutions proposed by either consumer groups or trial lawyers.

C. THE SKY IS FALLING: MEDICAL MALPRACTICE

Also implicit in the legislative findings is the belief that society's health care concerns can be resolved by restricting medical malpractice lawsuits. Patients have rights that politicians should not restrict. If the legislature truly had the interests of patients and doctors at heart, it would work to reduce medical injuries through well proven risk management principles, rather than reducing compensation.

Every year, medical negligence injures hundreds of thousands of Americans. A recent Harvard University study found that in New York alone, medical negligence causes from seven thousand to twenty nine thousand deaths annually. New England Journal of Medicine, Vol. 323, No. 4, July 23, 1991. A Rand Corporation study found that between twelve to twenty seven per cent of patient deaths could have been prevented absent sub-standard medical care. Annals of Internal Medicine, Vol. 109, No. 7, October 1, 1988.

Notwithstanding this public health epidemic, few malpractice victims sue, and fewer still recover. The Harvard study concluded that fewer than two per cent of medical malpractice victims file suit. Most of those claimants do not succeed. A comprehensive 1994 study of medical malpractice jury verdicts reveals that patients win fewer than one third of the cases which go to trial. USA Today, citing Jury Verdict Research Study, 4/4/94. The rate of medical

malpractice claims has "steadily declined" since 1985 Consumer Reports, July 1992. "The price of medical malpractice and professional liability [insurance] coverage for health care organizations remains stable and capacity is plentiful" Business Insurance, 3/28/94.

Incredibly, Alaska does not require that doctors be insured. Providence Hospital in Anchorage is one of the few major hospitals in the United States which permit physicians to practice without insurance.

In Alaska, juries are extraordinarily solicitous of physicians. If the case is not so overpowering that it settles out of court, it will almost certainly be lost before the jury. Alaskan juries have found for the claimant and against a doctor fewer than a dozen times in the thirty-five years since statehood.

A recent Duke University study of 2,000 medical malpractice cases in North Carolina reveals a median award of only \$36,500 The Atlanta Constitution, 2/1/93. A study by the American College of Physicians found that unjustified malpractice awards are 'uncommon' Annals of Internal Medicine, Vol. 117, No. 9, 1992.

The total elimination of all medical malpractice claims would save Americans less than one per cent of health care costs. Department of Health and Human Services, Office of the Secretary. On average, per-physician premiums are less than four per cent of practice receipts. Median Economics, November 4, 1991. The average cost per malpractice claim "for most health care organizations" has decreased in recent years Business Insurance, 3/28/94. When Alaskan physicians sold MICA, their own insurance company, several years ago, each member received a substantial payment based on MICA's surplus.

In 1994 the Congressional Office of Technology Assessment released a study of "defensive medicine". It revealed that a small percentage of procedures are ordered solely due to physician concern for malpractice exposure. The study concluded that "most malpractice reforms are unlikely to have much effect on defensive medicine" OTA Study, 7/21/94.

Caps on damage awards have no discernible effect on health care costs or doctor's

insurance premiums. Indiana's \$750,000 cap on damages, or California's \$250,000 cap on non-economic damages, have not reduced health care costs in those states. Indiana's health care cost ranking has remained identical before and after the cap. California's has gotten worse. Families USA Foundation, 1990. In twelve years following California's enactment of the cap, medical malpractice premiums in that state rose 191%.

State medical associations are notoriously lax in policing their own profession to sanction or remove repetitively negligent physicians. Because of the tort system, Alaskans receive better medical care. "It is sad but true that many physicians practice more carefully than they did in the past because they have an eye on the potential litigant...If the courts and insurance companies and the fear of malpractice become the most important disciplinary weapon in medicine—distasteful as the idea may be to physicians—so be it." Derbyshire, 'Malpractice, Medical Discipline and the Public', 10 Hospital Practice 109-216 (1984). See also Schwartz and Komisar, "Doctors, Damages and Deterrence: An Economic View of Medical Malpractice", 298 New England Journal of Medicine 1282 (1978).

LOCKING THE COURTHOUSE DOORS

SECTIONS 2-5

HOUSE BILL 158

House Bill 158 locks the courthouse door to many innocent victims of wrongful conduct, before they ever have a chance to file a claim. For example, if a homeowner builds a deck without a railing, and a child falls off more than eight years later, the child cannot sue. If the roof of Anchorage's Performing Arts Center collapsed during a performance, the age of that building would immunize all architects and contractors. A high voltage line installed contrary to standards; abandoned blasting caps or dynamite at a mine; a will negligently drafted by a lawyer; such negligence will go unpunished if it escapes discovery or does not cause harm within eight years. A lottery would control the rights of Alaskans; the losers would be locked out of the courtroom. The Alaska Supreme Court says, "It is profoundly unfair to deprive a litigant of his right to bring a lawsuit before he has any reasonable opportunity to do so". Hanebuth v. Bell Helicopter International, 694 P.2d 143, 147 (Ak. 1984). During the Hickel

administration, the Office of the Attorney General studied the predecessor to House Bill 158, and concluded, "The Alaska Supreme Court would probably find the proposed statute of repose invalid under several alternative provisions of the Alaska Constitution...we believe that the proposed statute of repose establishes distinctions between classes of people in a way that is not justifiable under the equal protection clause."

Section 5 of the bill locks children out of the courthouse. Now, the statute of limitations does not commence until children turn eighteen. House Bill 158 eliminates that protection. Section 3 provides special discriminatory treatment of babies and toddlers, if a doctor is at fault.

HANDCUFFING THE JURY: DAMAGE CAPS SECTION 6

Juries are the conscience of our community. The typical jury includes engineers, accountants, teachers, business people, housewives, government employees, and workers. Juries tend to be quite conservative, and to hold victims to a high standard of proof. A prominent defense lawyer who advises the "tort reform" group privately says that the defense lawyer who waives jury trial is a fool. Insurance defense lawyers always insist on a jury trial. The notion that Alaskan juries are incompetent and unreliable is nonsense.

Large verdicts are not routine. A Rand Corporation study proves that in the past quarter century, jury verdicts have only kept pace with inflation. The U.S. General Accounting Office has determined that large verdicts are not arbitrarily awarded, but rather reflect the severity of injury and the high cost of medical care.

Ignoring all this, the bill slaps Alaskan juries in the face, decreeing they can't be trusted to render fair verdicts. It does this by arbitrarily "capping" the amounts juries can award. With few exceptions, verdicts for pain, suffering, and lost enjoyment of life are limited to \$500,000. Paralyzed and severely brain injured victims are limited to \$500,000.

A quadriplegic can't move his body below his neck, has lost all bowel and bladder control, all sexual response, and requires round the clock attendant care. If his nose itches, he

can't scratch. He can't parent his kids, work, travel, play sports, turn a page, or hunt. Suicidal thoughts are common. Damages for these "non-economic" injuries to him and his family are limited to \$500,000.

Note that the victim only gets a portion of this money, perhaps half, because it must be shared with others in the family who have claims for loss of consortium. The actual quadriplegic's award for pain and suffering, spread out over his lifetime, could easily amount to only \$5,000 for each year spent in a wretched condition.

This cap only targets those who are so seriously injured they have pain and suffering claims beyond \$300,000. Persons suffering mild to moderate injuries are allowed full compensation. It is Alaskans with amputated limbs, gruesome burns, blindness, paralysis, and debilitating brain damage who will be affected by this harsh rule.

The cap will not lower insurance rates. Caps affect a tiny percentage of total insurance payout. Most cases settle for less than \$25,000. Cases with pain and suffering damages exceeding \$300,000 are extremely rare. Legislation which affects only a few innocent, catastrophically injured Alaskans per year will bring down the rates of most people a few pennies a year, at most. What's happening here is truly shameful; the neediest victims are sacrificed, without any corresponding benefit to Alaskans as a whole.

HANDCUFFING THE JURY: PUNITIVE DAMAGES SECTIONS 7-8, 23

Occasionally the conduct of a defendant is so repugnant that a jury assesses punitive damages. Under existing law, the conduct must be outrageous, and it must be proven by clear and convincing evidence. Punitive damages are rarely awarded.

When juries speak, corporate America listens. That's why defectively designed cribs no longer strangle infants. Trucks have back-up alarms. Once harmful medical devices have been redesigned. Auto fuel systems have been strengthened. Cancer causing asbestos no longer poisons homes, schools and workplaces. Farm machinery has safety guards.

Punitive damage cases are very uncommon. A comprehensive study of punitive dam-

ages in products liability cases found only 355 punitive awards between 1965 and 1990. One quarter were asbestos cases. Eighty per cent of the time, the manufacturer enacted a safety measure after the verdict. In the much maligned MacDonald's coffee spill case, two things happened. The judge lowered the punitive damage award to \$450,000; and MacDonald's finally turned down the temperature of its coffee, something that 750 prior accidents and complaints had not been able to accomplish. The bill lets criminals off the hook. Now, a driver who is high on drugs and kills meets the "outrageous" test, due to his reckless indifference to safety. The bill would require proof of "conscious acts" by a drunk driver, who will claim he did not know what he was doing.

The bill insults jury intelligence by capping the punitive award at the greater of \$300,000 or three times compensatory damages. Some corporations profit from systematic small thefts over many thousands of transactions. Limiting punitive damages to an arbitrary level undercuts their deterrent value, since reckless or malicious defendants might find it more cost effective to continue their bad behavior. This is precisely the decision making employed by the Ford Motor Company regarding its Pinto automobile. The company determined that it would be cheaper to sell the defectively designed car, and risk paying damage awards to injured consumers, than it would be to make the car significantly safer at a cost of \$11 per car.

The conservative United States Supreme Court recently upheld a substantial punitive award, in the millions, where the compensatory damages were \$19,000 but heavy deterrence was needed. Few other states limit punitive damages. Why should Alaskan juries faced with overwhelming evidence of outrageous conduct be handcuffed?

The bill allocates one half of the punitive damage award to the state, with no fee thereon to the lawyer. This creates a disincentive to the plaintiff and the lawyer to pursue such a case, particularly when the compensatory damages are modest. If an insurance company swindles its insured out of \$20,000, the most the client could recover in punitive damages would be \$150,000. That is simply not enough to justify the risk and expense the lawyer and client must bear to pursue such a case over the course of several years.

Why would the legislature want to limit the power of the jury to correct the conduct of corporations which are proven guilty by clear and convincing evidence of intentionally malicious behavior? At a time when the legislature is raising criminal penalties to hold individuals accountable for their behavior, why is reducing penalties for the malicious conduct of foreign corporations a high priority?

INCOME TAXES SECTION 9

This section commands that we take the income taxes which a victim would have paid in the future if uninjured, and credit them to the wrongdoer. Congress gives injury victims a break by not taxing their recoveries. The bill strips victims of this tax break, and hands it over to wrongdoers.

Most states do not deduct taxes from future lost income awarded by a jury. Figuring out future taxes is highly speculative. The tax code changes, as does the victim's tax status. Will he or she marry? When? How many children? Own a home? Have an IRA? All these unknowns affect tax liability. The jury is in effect asked to fill out twenty or thirty future tax returns by gazing in a crystal ball.

At a time when everyone is concerned with the expense and delay of lawsuits, does it make sense to add more complexity, court time, and jury aggravation?

AN ADMINISTRATIVE NIGHTMARE: PERIODIC PAYMENTS SECTIONS 10-12

Once a lawsuit is over, it's over. The judgment is paid in a lump sum. Future lost wages have been adjusted downward to reflect their early payment. In order to preserve the value of his lost income award, the victim must immediately invest this money, so interest will augment it and permit regular withdrawal to match what his salary would have been. Similarly, the jury has decided on the correct amount to pay the victim for future pain and suffering. The case is closed.

Rather than the straightforward system, House Bill 158 would allow the wrongdoer to pay the victim's future losses on the installment plan. Victim and wrongdoer would be joined for life by ongoing payment obligations. Such payments will be expensive to administer, and they won't accomplish anything beyond enriching outside insurance companies.

To set the payment level, the judge will guess the average inflation over the remaining life of the victim. If the judge guesses low, the victim will lose, because the wrongdoer will eventually be able to pay the victim in cheap dollars. A wrong guess could never be fixed, and could wipe a victim out.

The flexibility and discretion a victim currently possesses is eliminated. If the victim has an expensive medical crisis, the timing and amount of payments can't be adjusted. The bill mechanistically assumes the victim's needs are the same at age twelve and age seventy.

Insurance companies are not required to post security for their future payments. Insurance companies become insolvent each year. As of 1987, Executive Life had assets in the billions and the highest possible rating. Now it's bankrupt, with a trail of broken dreams behind it. One hurricane through New Orleans, one California earthquake, could devastate an insurance company. Why leave an Alaskan accident victim dependent for life on the solvency of one company?

Who is the big winner here? Out of state insurance companies get to control the victim's money. They get to invest it any way they want. It's like an interest free loan.

COLLATERAL BENEFITS SECTION 14

Collateral benefits are automatic payments to an injured person from sources such as medical insurance, state medicaid, or workers' compensation benefits. When an injured person sues, he or she makes claim for medical bills or lost wages which might have already been partially paid by insurers. If the jury awards these damages, the insurers or the state or Alaska get paid back, so there is no double recovery by the victim. This is called subrogation. Subrogation rights are included in virtually all health insurance policies. Reimbursements of

workers' compensation and medicaid payments are required by Alaska statutes. The state hires an accounting firm to monitor its medicaid liens.

The bill would cancel these repayments to insurers and the state, and instead reduce the damages payable by wrongdoers. To provide a benefit to proven wrongdoers, the bill penalizes every health and workers' compensation insurance carrier doing business in Alaska, plus raids the state treasury.

This section tells the jury about the victim's insurance, but not the wrongdoer's. It will increase the cost of health and worker's compensation insurance. It's a misguided, flagrantly unfair imposition on the innocent in favor of the guilty.

TURNING A TRIAL INTO A CIRCUS SECTIONS 14-15

The boring, technical language of these sections conceals a revolution in how jury trials will work. Under current rules, the parties to a lawsuit each have a lawyer. The jury listens to everyone, and assigns percentages of fault to the plaintiffs and the defendants. This legislation totally changes that, by permitting the jury to assign fault to "empty chairs" persons who have not been sued, have not defended, and are not present in the courtroom. The empty chairs pay nothing, but their fault decreases the award to the victim.

This rule change degrades the fairness of our jury trials. For example:

Victim is heavily burned in a LP-gas explosion caused by Defendant. She would have survived, except she is a drinker and a smoker. With weakened liver, heart and lungs, she doesn't have a chance. Victim's husband and kids sue Defendant. Defendant has a smart lawyer, who consumes two months of court time presenting evidence against the tobacco and liquor industries for failure to warn victim of health hazards. Those empty chairs of course do not fight back. Although such cases have never prevailed in the United States when defended, the jury buys the argument. End result: Defendant 40%, Marlboro 30%, Johnnie Walker 30%. Only Defendant pays; scotch and cigarette don't, because they were never sued. Victim loses 60% of her damages.

The bill gives defendants every incentive to accuse peripherally involved people. Reputations will be smeared in court by defendants, with no chance for the person behind the empty chair to respond. The average duration of jury trials will increase, as the truth finding quality of those trials degrades.

Alaskan workers will be especially disadvantaged by this change. Now, the workers' compensation law gives employers immunity from civil suit, and no fault can be allocated to them. The bill maintains employer immunity, but burdens the worker with the employer's fault. In every case where a worker is hurt, the defense will criticize the employer in absentia, alleging inadequate safety rules, insufficient procedural manuals, lack of inspection and supervision, failure to buy modern equipment, to train employees, and the like. The employer will have no reason to defend its conduct since the employer is immune and is not obligated to pay its share of the fault. Yet, every bit of fault the jury ascribes to the absent and unrepresented employer will directly diminish the injured worker's verdict.

These provisions are the real sleepers of the bill. Wrapped in dry, technical prose is a radical transformation of jury trials, so that much of the trial is about people and companies who are not present in the courtroom. Not only victims will be hurt; taxpayers will pay for longer trials. Individuals and companies will be publicly pilloried and defamed without a chance to respond. Much of the fairness built into our system as we have known it since statehood will be abandoned.

A REWARD FOR STALLING SECTION 16

Section 16 deals with a partial settlement of a case between a victim and one or several wrongdoers. It is poorly drafted. If it is interpreted to mean that a partial settlement is deducted from the jury award, and that the remaining defendant's percentage of fault is then applied to that reduced number, it becomes mathematically impossible for the plaintiff to fully recover, unless the jury finds the remaining defendant 100% at fault.

Under current law, a defendant who goes to trial pays his percentage of the fault as

round by the jury. It may be that the muddled drafting of this section seeks to change that by crediting to such a defendant any overpayment by a settling defendant. Such a provision allocates to victims all of the risks, and none of the benefits, of pretrial settlements. A victim can only break even or lose by a partial pretrial settlement. A defendant can only break even or win by failing to settle. Settlement is discouraged, and stalling is encouraged. This proposal will increase the cost of litigation by discouraging pretrial settlement.

CONFISCATION OF THE HOMES AND SAVINGS OF VICTIMS SECTION 17

The current "Offer of Judgment" rule is a procedural device to encourage pretrial settlement by giving a moderate reward to one who makes an offer, and after rejection does better at trial. House Bill 155 raises the stakes exponentially, by increasing the price of misjudgment to an intolerable level, full costs and attorney fees to the person making the offer.

This provision is breathtaking in its scope and perversity. Not only will the victim who loses at trial pay the defendant's entire attorney fee and all costs. Also, the victim who wins at trial, but guesses wrong about the size of the verdict, will pay just as if he had lost. The victim pays if he loses, the victim pays if he wins.

Suppose an accident victim suffers a broken back, is in the hospital a long time, and has one hundred thousand dollars in medical bills. His lawyer researches other jury verdicts, and concludes the case is worth two hundred fifty thousand dollars. The defendant made an early offer of judgment of \$125,000, only twenty five thousand above the medical bills. The jury awards \$120,000. Now the victim must pay attorney fees and costs, which could easily wipe out the entire judgment. The defendant, proven guilty before a jury, goes scott free. The accident victim is stuck with \$100,000 in medical bills he can't pay. Doctors, hospitals and the State of Alaska will therefore have to subsidize this benefit to the wrongdoer.

This example is a simple one. A case may have multiple defendants, each making an offer of judgment. If the plaintiff guesses wrong on any of the offers, he can be wiped out.

even if he wins the case. Or the defendants may suddenly accuse a non-party of fault, and invalidate the assumptions on which a plaintiff earlier rejected an offer or judgment.

Such a system would further erode personal responsibility in Alaska, because it would force injured citizens to back down from holding wrongdoers fully accountable. Victims would choose between accepting a low offer and the risk of financial ruin. Winning a trial is never guaranteed, much less recovering a particular sum from a particular defendant out of many defendants and non-party players. This section gives excessive leverage to insurance companies to undercompensate injured Alaskans. The result: middle class plaintiffs will be forced to accept an insurance company's lowball offer. Who among us would risk his home and life savings betting on a lawyer's prescience regarding the exact size of a jury award from each defendant and each empty chair? This is one of the most anti-victim sections of House Bill 158.

MORE REWARD FOR STALLING SECTIONS 18-19

Currently a wrongdoer pays 10.5% annual interest from the time he receives notice of suit, until the jury decides the case. This is fair, because the wrongdoer has held money due the victim for several years, and has been able to invest it.

The bill would eliminate most of this duty to pay interest. First, it would exempt most of the judgment, the future part, from any interest at all. Secondly, it would cut the remaining interest to the federal discount rate plus 3%. Insurance companies are businesses who play hardball. If they can make money by delaying settlement, they will do so. This section gives them every incentive to delay.

The State of Alaska charges tax deadbeats a minimum of 11%. When the prejudgment interest rate is eliminated for some damages and lowered for other damages, insurance companies are in effect given a low interest loan for as long as they can stall the proceedings. It shouldn't be allowed.

MORE SPECIAL RULES FOR DOCTORS

SECTION 21

The Rules of Evidence adopted by the Alaska Supreme Court govern the qualifications of experts testifying before juries in Alaska. Once again, the medical profession is seeking special rules to make medical malpractice actions more difficult for the plaintiff.

First, this section complicates the victim's life by requiring an exact match: it takes an orthopedist to testify against an orthopedist. Why shouldn't an experienced family practitioner who is qualified to do so, be permitted to testify?

Secondly, the section can be read to require board certification. In medicine, this is akin to an advanced degree. Orthopedic surgeons practicing in Anchorage are not necessarily board certified. Why should an interest group like the State Medical Board be given the power to control who testifies as an expert, rather than our courts? No other profession has this privilege.

Thirdly, the section eliminates all retired physicians as expert witness by establishing an irrebuttable presumption of incompetence one year post retirement. Alaskan victims already struggle with a conspiracy of silence under which Alaskan doctors will not testify against their colleagues. Victims must undergo the added expense of locating expert witnesses out of state. This section would further reduce the expert witness pool by eliminating retired doctors, who are less subject to peer pressure. C. Everett Koop, the retired Surgeon General of the United States, could not testify in Alaska. These special interest rules for doctors are transparently unfair.

WHAT IS A HOSPITAL?

SECTION 23

Should hospitals be allowed to contract out vital patient services they are required by law to provide, to uninsured medical corporations, and wash their hands of the consequences?

For example

An infant loses both kidneys because of incompetent nursing care in a hospital. He will require weekly blood cleansing (dialysis) for the rest of his life. The hospital denies any responsibility for the substandard care, because it hired Rent-A-Nurse to supply contract nursing services. Rent-A-Nurse was low bidder for the contract because it doesn't bother with insurance. Infant loses, and state medicaid gets stuck for millions.

People go to a hospital because it is an organized, coherent institution, rather than a coaling house for private care providers. If the hospital is immunized for the negligence of routine services contractors, it has no incentive to supervise its emergency room, its radiologists, its anesthesiologists, or its lab. This is poor public policy. The Alaska Supreme Court has ruled that hospitals should be hospitals, and should stand behind the medical care they provide the public, without resort to legal gymnastics. This sensible decision should not be overturned.

AFTERWORD

The drafters of House Bill 158 are nothing if not relentless. Time after time, they seek to disadvantage the innocent victim in favor of the proven wrongdoer. They want to handcuff our discretion when we sit on juries. They want to lock the courthouse doors to victims, based on random occurrences beyond anyone's control. They want to break the backs of middle class victims who have the courage to seek full compensation, but who guess wrong about the amount or the verdict or the complicated fault allocation. They want to coddle corporations proven by clear evidence to have acted maliciously. They want more special treatment for the medical profession. They want tax breaks, interest free loans, installment plans, insurance benefits, tortious immunities—all for the bad actor, the certified wrongdoer. They want every injured worker to be punished for his or her employer's negligence.

Who are these victims, and why are they deserving of harsh treatment? They are you and I, and our children, and our children's children. They are those among us who will one day suffer tragedy. They are tomorrow's Ted Stevens or Arliss Sturgulewski, politicians who lost spouses because of negligence and became claimants. They are rich and poor, young and old. They are our most productive workers in our most hazardous jobs. They are the roustabouts and the roughnecks. They are us. The rights we treat cavalierly are our rights.

Alaskan legislators have already implemented drastic changes in favor of defendants. Alaskan cities breathe easier, because "deep pocket" liability is no more. The insurance industry is not in crisis. We now know from experience that measures limiting victims' rights do not reduce premiums.

What we are left with in Alaska is a small group of extremist "tort reformers" who advocate this legislation based on their deep animosity to lawyers and lawsuits, period. These special interests have no fidelity to our constitutional jury system, but would destroy it with the death of a thousand cuts.

Since their bill is technical and complex, legislators may not grasp how drastically it affects the families in their districts.

If this happens, Alaska will have passed the most radical anti-victim legislation in the United States. Alaskans will have fewer and lower quality civil rights than other Americans and we will have done it to ourselves, not for any good reason, but merely to make Alaska a more profitable if minuscule niche in the national insurance market. What a shame.

House Bill 158 is harsh legislation which kicks innocent Alaskans when they are down and out. It grants Alaskans no commensurate benefit, such as a mandatory 20% reduction in auto and liability insurance premiums. Let us hope that our legislators find the courage to stand up for individual Alaskans against those who would rob us of our rights.

THE FOLLOWING HAVE SPOKEN IN OPPOSITION TO
THIS ANTI-VICTIM LEGISLATION OR ITS
PREDECESSOR LAST SESSION

ALASKA NETWORK ON DOMESTIC VIOLENCE
AND SEXUAL ASSAULT

ALASKA POLICE DEPARTMENT EMPLOYEES ASSOCIATION

TRUSTEES FOR ALASKA

AMERICAN ASSOCIATION OF RETIRED PERSONS. ALASKA

ALASKA STATE AFL-CIO

ALASKA ENVIRONMENTAL LOBBY

ALASKA WOMEN'S LOBBY

NEA-ALASKA

ALASKA HEALTH PROJECT

DES ACTION

ALASKA PUBLIC INTEREST RESEARCH GROUP

Addressing the
Myths & Misconceptions
about Personal Injury & the
Civil Justice System

Compiled by
The Alaska Academy of Trial Lawyers

January 1995

SUPPORTING DOCUMENTS

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 - b. The frequency and severity of medical negligence claims has remained relatively constant.

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- 1. Liability claims without merit are not compensated, and the size of the payment is commensurate with the severity of the injury
- 2. Rather than seeking large settlements, most injured patients sue for other reasons
- 3. Very few incidents of medical negligence result in a claim
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- 1. The cause of medical negligence is medical negligence -- negligent doctors committing preventable errors
- 2. A small number of physicians are responsible for most of the negligence
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- 1. Medical liability insurance is less than 1% of the total cost of health care
- 2. Medical negligence insurance is highly profitable for both private and physician-owned insurance companies

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- 1. Tort restrictions will not resolve the problem of access to health care

Preface

We have recently celebrated the Bicentennial of the Bill of Rights of the American Constitution. That Constitution and those of the States, including Alaska, declare as fundamental, the right to jury trial and equal access to civil justice for all.

And yet today our civil justice system and the rights of injured victims and consumers are under attack. Politicians in search of solutions to such complex matters as runaway medical costs, the budget deficit and America's competitiveness in the market, oftentimes skew statistics to perpetuate unfounded myths and misconceptions about our legal system in an attempt to pin the problem on lawyers and the injured victims they represent. The multi-million dollar propaganda efforts of insurance companies and their corporate colleagues have borne fruit in biased judges, alienated juries, regressive state and federal legislative efforts, and a social environment permeated by an uncaring attitude toward the rights of the injured victims.

For more than a decade, the legislative debate over the "liability insurance crisis" has assumed that a crisis existed and focused on restriction of the rights of victims of negligence to recover fair compensation to resolve that crisis. Despite any hard data to support their claims, representatives of the insurance industry have asserted that restriction of victims' tort rights will result in lower liability insurance rates. In response to these assertions, the Alaska Legislature has adopted some of the most severe restrictions of those rights of any state in the country.

In 1989, then Speaker of the House, Sam Cotton, at the request of several fellow representatives, formed the Alaska Liability Insurance Task Force. The task force was comprised of legislators and members of medical, insurance, consumer and legal organizations familiar with liability insurance issues. The most significant finding from the data collected by the task force was that, with some exceptions, there is no liability insurance crisis in Alaska.

Although there were minor differences in the conclusions reached in the various studies collected by the Liability Insurance Task Force, the general consensus was that, at best, restrictions on the rights of victims to receive fair compensation through the tort system have had only a "modest", if any, impact on liability insurance rates. More importantly, the consensus among the scholars was that state legislatures should direct their attention away from the tort system and towards alternative solutions to resolving any existing liability insurance problems.

What these studies did not address is the extent to which the public is forced to financially support those tort victims who have been disenfranchised from the legal system because of existing restrictions on tort recovery and the extent to which this gap would widen if further restrictions on tort victims' rights were enacted.

ACCESS TO JUSTICE

RIGHT OF TRIAL BY JURY -- THE FOUNDATION OF OUR SOCIETY

A fundamental guarantee in the Alaska State Constitution.

- A Guaranteed Right: Article I, Section 16 holds that in civil cases where the amount in controversy exceeds \$250, the right of trial by jury is preserved.

The jury, as conscience of the community, promotes safety and equity.

- Juries Promote Safety: Over 5 million Americans serve on juries each year. As the conscience of the community, their decisions determine guilt or innocence, safety and security, life and death. Countless improvements aimed at preventing injuries and saving lives might never have occurred without trial by jury and its time-tested ability to bring about changes for the better.

- A Triumph of American Democracy: According to the consumer group, Public Citizen, "The right to collect damages through the civil justice system is one of the great triumphs of American democracy. It allows anyone, no matter how poor, to challenge the largest corporation or government agency and reclaim compensation for wrongful injuries. It forces wrongdoers to change their products and practices to prevent further injuries and avoid further liability."

Critics of the jury system are the most likely to request a jury trial.

- The Ultimate Irony: The loudest critics of the jury system are insurance companies and the defendants they represent in personal injury litigation -- corporations, local government, and doctors. Ironically, the party most likely to request a jury trial in personal injury litigation is the defendant. In fact, insurers almost always demand a jury trial.

TORT RESTRICTIONS DO NOT REDUCE INSURANCE RATES

Evidence indicates that tort restrictions have no significant impact on insurance premiums or availability.

- Insurance Services Office (ISO) Says "NO REDUCTION": A 1987 ISO study determined that tort "reforms" enacted in 1986 would have little or no impact for the majority of liability claims filed with insurers. In October 1986, ISO determined that

its rates would not reflect recent state tort restrictions because ISO was unable to determine any cost effect of the tort law changes.¹

• Insurers Say "NO REDUCTION": Insurers required to provide Washington State Insurance Commissioner Richard Marquardt with evaluations of the effects of tort reforms on proposed rate filings indicated that there was no way to make such a determination, and that the 1986 law would have a minimal effect on rates. Responses from insurers in other states indicate that tort restrictions do not resolve insurance price fluctuation, reduce rates or increase availability.²

• Washington State Insurance Commissioner Says "NO REDUCTION": In 1987, Commissioner Marquardt told a U.S. House committee, "It is difficult, if not impossible, to pin a price tag on tort reform or to even assess accurately its effect on insurance availability and affordability. Based on our research, by the middle of 1986, general liability rates had begun to stabilize throughout the United States -- not just in the states that had adopted tort reform."³

• 1991 Washington Insurance Commissioner Report Says "NO REDUCTION": A 1991 report by Marquardt to the legislature notes that insurance rates in recent years have stabilized and coverage is more readily available, however, tort changes cannot be credited as the reason. Insurers still find it difficult to quantify the impact tort reform on insurance rates. A 1989 law requiring insurers to consider investment income in setting rates was projected to have a much greater impact on insurance rates than changes in the tort system.⁴

• Best's Says "NO REDUCTION": A 1989 Best's Review article on a presentation by David B. Mathis, CEO of Kemper Reinsurance, quoted Mathis as saying, "The only way to achieve stability in the market is through adequate price levels. First of all, despite the publicity it has received, tort reform has turned out to be a non-event in terms of its impact on the big picture."⁵

A case history -- medical negligence restrictions have little impact on rates.

• 1978 Limitations Fail: A study of medical negligence legislative limits passed in various states from 1974 to 1978 concluded that the changes, either individually or collectively, did not reduce or stabilize insurance rates.⁶ Following adoption of MICRA in 1975, California's medical liability insurance premiums continued to rise (increases of 161 to 177% between 1980 and 1986.) Indiana, which adopted the most restrictive medical negligence laws of any state, had premium increases of 53% to 116% during the early 1980s.⁷

- The Crisis of 1985-1986: Despite the fact that tort restrictions had little or no effect on resolving the so-called crisis of the 1970s, a number of states passed laws restricting medical negligence actions during the mid-1980s when liability premiums began to skyrocket.

- Rate Reduction Not Due to Liability Restrictions: Nationwide, medical liability premiums began dropping early in 1989 due to a reduction in claim filings and a reduced increase in the costs to settle claims.¹⁹

THE LITIGATION CRISIS: DEBUNKING THE MYTHS

Personal injury cases represent a small percentage of the courts' workload.

- The courts are overburdened with over 13 million civil lawsuits filed in state courts each year: This 13 million dollar figure includes millions of routine cases such as small claims, traffic and other ordinance violation cases, domestic relations, estate and contract matters. The most recent figures from the National Center for State Courts show that the number of tort cases filed in state courts was less than half a million, or less than three percent of all state filings.

- Federal Courts: Studies of federal tort filings show lawsuits are on the decline. Over the last thirty years, tort cases as a percentage of federal civil cases dropped by nearly half, from 36.4 percent in 1960 to 20.1 percent in 1990. Product liability litigation is shrinking even faster. It has been reported that federal product liability cases, other than those involving asbestos, have been shrinking steadily in recent years, falling 40 percent between 1986 and 1990.

If there is a "litigation explosion," it is being driven by businesses suing businesses, not by personal injury actions.

- Businesses suing businesses: According to a University of Wisconsin study, federal litigation between corporations has increased astronomically, growing more than 1000% between 1971 and 1986.²¹

- State Courts: According to the National Center for State Courts, tort filings are not increasing at a faster rate than other major categories of civil filings. The most dramatic increases in civil cases are real property and contract cases, not torts.²²

- Federal Courts: Nationally, between 1979 and 1987 contract cases filed in Federal District Courts more than

tripled and property cases quadrupled -- far exceeding growth in personal injury filings.¹³

Most cases are resolved prior to trial.

- Most Cases Are Settled: Only 5% of all personal injury cases filed in state courts go to trial. Complex actions, such as medical negligence cases, are more likely to go to trial than cases such as automobile personal injury (11% of medical negligence cases filed result in trials). Most cases are settled, withdrawn or dismissed prior to trial. 6% of all personal injury cases are uncontested by the defendant.¹⁴

LARGE JURY VERDICTS ARE UNCOMMON

Huge jury verdicts, such as million dollar verdicts, are the exception rather than the rule.

- Huge Verdicts are Rare: Huge personal injury payouts are a rarity. The largest settlements and verdicts are made to the most seriously injured victims.¹⁵ If anything, juries are very cautious and reticent to adequately compensate injured persons. The multi-million dollar advertising campaigns of the insurance industry have used anecdotal information to make the public feel guilty about fairly compensating persons negligently injured by others.¹⁶

- Million Dollar Verdicts are Uncommon: According to Business Week, "Over the past 14 years in our nation of 240 million people there has been only 1,642 awards of \$1 million or more. Furthermore, two-thirds of the 1,642 cases involved victims who suffered either permanent paralysis, brain damage, amputations or death."¹⁷

- Alaska Personal Injury Verdicts are Lower than National Verdict Average: Alaska personal injury verdicts currently average 3.1% below national verdict values.¹⁸

- The Most Severely Injured Persons Receive the Higher Verdicts: Product liability and medical negligence victims generally sustain more severe injuries and are more likely to receive a larger jury verdict. While the 1988 average verdict for personal injury litigation in U.S. state courts was \$69,622, the highest average verdict was in the area of medical negligence (\$146,811).¹⁹

Jury verdicts can be reduced -- the actual payout to the plaintiff may be less than the jury verdict.

- Verdicts Can be Reduced on Appeal or Settlement: The actual payout to the plaintiff is reduced after the trial verdict in about 20% of cases. The larger the verdict, the greater the likelihood that the verdict will be reduced. Of the cases where a verdict is reduced, the average actual payout is about half (53%) of the original verdict amount.²⁰

"HORROR STORIES" MAKE BAD PUBLIC POLICY

Use of outrageous and atypical examples to create the impression of abuses and/or weaknesses in the civil justice system are common. Cases cited by tort critics alleging frivolous lawsuits and excessive jury verdicts are very often misleading and inaccurate.

Some examples of "horror stories":

- The Pure Fabrication -- The Lawn Mower and the Hedge Story: A widely-circulated story given in the mid-'80s as an example of our litigious society told of a man who successfully sued a lawn mower manufacturer for injuries suffered while using one of their lawn mowers to trim his hedge. In fact, this case is fictitious. It does not exist. It was a fabrication of tort reform proponents.

- Failure to Disclose All Pertinent Facts -- The Phone Booth Near the Road: In 1986, President Reagan noted that it was absurd for a California man to recover damages from a telephone company because he was in one of their booths when it was struck by a drunk driver.²¹ The facts conveniently left unstated included: 1) The company knew the booth was too close to the street because it had been hit before; 2) complaints had been filed with the telephone company stating that the booth was difficult to exit because the door jammed; 3) the trial court had granted a lower court summary judgment to the company, but the California Supreme Court remanded the case to the lower court because the risk of injury was foreseeable by the telephone company; and 4) the case was ultimately settled.²²

- Not Appropriately Placing Blame - Beware of Horse Manure: In 1987, a CBS "60 Minutes" segment focused on a lawsuit against a ladder manufacturer in which the plaintiff recovered \$100,000. According to the manufacturer, the plaintiff was injured when the temperature increased from 20 to 40 degrees and the ladder slipped because it had been placed in a manure pile. "We didn't warn him about the viscosity of horse manure," said the manufacturer. To their credit, "60 Minutes" ran a follow-up segment in which a number of

alleged tort horror stories were recused. In re-examining the ladder story, reporter Ed Bradley noted, "Several jurors...told us the viscosity of horse manure had nothing to do with their verdict. They said they were persuaded by the plaintiff's contention that the ladder was defective, and that's why he was injured."²³

- The Tort System Works -- The Psychic and the CAT Scan: A Philadelphia jury awarded \$1 million to a woman who claimed she lost her psychic powers after undergoing a CAT scan. In fact, the woman had warned the doctor of previously having had an adverse reaction to a similar procedure. She then suffered anaphylactic shock when the procedure was performed. The jury that returned a \$988,000 verdict had been instructed to disregard the woman's alleged loss of earnings because she was no longer able to "read auras." The judge found the verdict excessive and ordered a new trial. This case demonstrates that the safeguards in the process work."

THE COSTS OF PERSONAL INJURY

INJURED PERSONS BEAR THE BURDEN OF PERSONAL INJURY

The injured person bears the brunt of the cost of injury.

- The Injured Person Pays First: Whether or not an injured person is reimbursed for a personal injury from another source, the initial cost of the injury is borne by the injured person and his or her family. The costs of injury include medical bills, lost wages and property damage. Personal injury often causes additional losses, such as the inability to pay bills (the house, the car), increased debt obligations and interest payments, and increased stress on family relationships. The burden of locating reimbursement for medical, wage loss, and other costs of injury falls on the injured person.

- When Defendants Don't Pay and Victims Can't, Taxpayers Do: Most personal injury cases involve significant medical and related expenses. When the victim can't pay and the defendants aren't required to fully compensate for injuries, the uncompensated cost of care is usually borne by government agencies -- in other words, by you and me as taxpayers.

- 38% of Economic Damages are Paid Out of Pocket: The total annual economic loss associated with nonfatal injuries in the U.S. is \$175.9 billion. 38% of this total economic burden is not reimbursed by any outside source and is paid for out-of-pocket by those who are injured. 64% of wages lost due to injury are not

reimbursed and are borne exclusively by those injured.⁴⁵

Personal injury liability compensation does not pay for the actual cost of injuries.

• Only a Small Number of Victims Receive Personal Injury Liability Compensation: Only 10% of all accident victims receive personal injury liability compensation. The personal injury system plays a greater role in compensating motor vehicle injury victims. Those injured in motor vehicles are more likely to receive personal injury liability compensation (31%) compared to persons injured in some other manner.⁴⁶

CIVIL JUSTICE SYSTEM PROMOTES SAFETY IN AMERICA'S ECONOMY

TORT LAW IMPROVES AMERICAN PRODUCTS

The tort system saves lives, reduces injuries and promotes public safety.

• Product Liability and Tort Law Promote Safety: There are huge benefits of the current tort system. Businesses devote greater attention to safety. There is a heightened consumer perception that products are safer and of higher quality. Workplace and other injuries have been reduced resulting in thousands of lives saved and millions of injuries prevented. The existence of these very large benefits should give policymakers cause for careful reflection as they are pressed to weaken product liability and tort law in general. Reducing the costs of the system may reduce the benefits and leave society worse off.⁴⁷

• The Tort System Contributes to a Competitive Society: Without a strong tort law, the ethical corporation would have a competitive disadvantage and would be tempted to put profits before public safety. The American focus on safety in conjunction with punitive damages will produce the top quality products needed to compete in the international marketplace. "Our analysis suggests that the rules of product liability make a good deal of economic sense."⁴⁸

• Punitive Damage Awards Do Not Undercut United States Competitiveness: Perhaps nothing is more grossly exaggerated than claims about punitive damage awards, particularly in product liability cases. The most comprehensive study ever conducted on punitive damages in product liability cases -- a survey of the past 25 years -- indicated just 155 cases in the entire country. That's only ten per year for the entire country. The

median punitive damage jury award was \$1.5 million, with post-trial activity sharply reducing the median amount actually paid to \$250,000. The study also found that 82 percent of businesses assessed punitive damages subsequently implemented safety measures such as product recalls or improved warnings and instructions.²⁹

- Harmful Products are Removed or Altered: Examples of unsafe products which have been removed from the marketplace due to the tort system include the Dalkon Shield, asbestos, flammable baby clothes, and unsafe infant formula. Examples of products redesigned to improve safety resulting from the tort system include the Ford Pinto, safety devices on machinery and childproof caps.³⁰

- Product Liability Expense Adds Little Cost to Consumer Goods: A new study by the National Insurance Consumer Organization (NICO) found that product liability expenses added but a tiny amount to the cost of consumer goods. The total cost of product liability insurance amounts to 0.14 percent of the cost of the more than \$1.8 trillion worth of retail sales in the U.S. in 1991. The study used insurance industry data which broke out liability premiums as a separate line item for the first time.³¹

Insurers reap benefits while projections of future losses have decreased.

- A Shift Toward Defendants: During the mid-80's judicial decisions in product liability cases nationwide shifted toward defendants. Dismissal of product claims and new legal grounds for defendants have increased during the past half decade.³²

- Insurers Continue to Make Big Profits: While projections of future losses have decreased, insurers' reserving practices and insurance rates have not. Why? Insurers are focusing on restricting state and federal liability laws. They can't claim a need for change while recognizing reduced losses and greater profits.³³

- Insurers Use Natural Disasters to Raise Rates: The day Hurricane Andrew rolled into Miami, a top insurance company executive for American International Group, issued a memo to regional presidents and vice presidents saying "This is an opportunity to get price increases now. We must be first and it begins by establishing the psychology with our own people."³⁴

Claims that the tort system stifles innovation is a ruse.

• Dangerous Products Kept From Market for Good Reason: Tort restriction proponents claim that the threat of litigation keeps products off the market. When Consumer Union examined the list of products being held from the market, the reasons they were pulled of the market were based on valid safety concerns. For example, the Jeep CJ-7, which tends to roll over at low speeds, and an anesthesia gas machine for which the manufacturer had failed to conduct tests of the design of critical components, were on the list of products pulled from the market because the tort system was "stifling innovation".

• Corporate Report Says Liability Suits Do Not Impede Competition: "The most striking finding is that the impact of the liability issue seems far more related to rhetoric than to reality...For the major corporations surveyed, the pressures of product liability have hardly affected larger economic issues, such as revenues, market share, or employee retention...Where product liability has had a notable impact - where it has most significantly affected management decision making - has been in the quality of the products themselves." In addition, numerous federal agency studies of industry competitiveness conducted during the 1980's fail to mention the liability system.

The cost of liability claims is minor compared to the GNP.

• The Cost of Liability Claims v. U.S. Productivity: The total compensation from tort liability claims to persons with nonfatal traumatic injuries in the U.S. amounts to only three-tenths of one percent of the Gross National Product of the United States." The total cost of all commercial liability insurance premiums in the U.S. in 1990, including general liability, automobile liability, and umbrella insurance was only \$43 billion, less than 1% of the U.S. Gross National Product."

MEDICAL NEGLIGENCE FACTS vs. MYTH

MEDICAL NEGLIGENCE CLAIMS -- THE REAL FACTS

Lawsuits protect the public -- the benefits outweigh the costs.

• Restrict Patients' Rights at Our Peril: One very important aspect of medical negligence litigation is the useful examination of the practice of medicine itself. Because the buyer of medical care cannot be expected to evaluate the quality of medical care, the market cannot adequately identify incompetent health care providers. "The data suggest that to eliminate or seriously restrict

a patient's right to file a malpractice claim is a step we would undertake at our peril."⁹

- Medical Negligence Standard of Care: Under Alaska law, a physician is responsible for the harm caused when the physician fails to use reasonable care in providing medical care. Other professionals, such as architects, bankers, and lawyers are also required to exercise reasonable care in their professional activities.

The frequency and severity of medical negligence claims has remained relatively constant.

- Closed Claim Study in Minnesota: The Minnesota Insurance Commissioner conducted a study of medical negligence insurance claims filed in Minnesota, North Dakota and South Dakota. The study examined all claims filed from 1982 to 1987 for the two largest medical negligence insurers in the region. 27% of the claims were closed with a payment average of \$54,629; the median was zero. Only one-tenth of one percent of the claims resulted in a payment exceeding \$1 million, and only 4% exceeded \$100,000. Of the 3% of cases that actually went to trial, the defense prevailed in 81 percent of them. In the 20 favorable jury verdicts for the period, no pain and suffering damages were awarded. No cases involved punitive damages. A final note on the Commissioner's study: Saint Paul announced a rate cut of 25 percent on its medical malpractice premiums in Minnesota.¹⁰

- Unjust Payments are Rare: A new study of medical malpractice cases finds that, despite popular belief, unjustified payments are rare. The study is one of the first systematic attempts to assess the quality of care in malpractice cases and was based on 3,201 cases filed in New Jersey over the past 15 years. The data came from the state's doctor-owned insurance company and the authors contend that their findings are relevant to the nation as a whole. In concluding that unjustified payments are not the norm, the study contradicts the conventional wisdom among doctors, which is that malpractice litigation is a lottery and that verdicts often depend on the whim of jurors.¹¹

- Stable Rate of Frequency: The Minnesota closed claims study identified little measurable change in claim frequency over a six year period. The frequency rate was actually greater in 1983 than in 1987 and the average payment appeared to be decreasing over the period of the study. In fact, the study concluded the "data does not substantiate the litigation explosions assertion."¹²

MEDICAL NEGLIGENCE -- DEBUNKING THE MYTHS

Liability claims without merit are not compensated, and the size of the payment is commensurate with the severity of the injury.

- The System Works: The findings of a closed claims study of obstetric claims from a large physician-owned insurance company between 1982 and 1988 indicate that non-meritorious claims were not compensated. Where a claim was paid, poor physician judgment was the primary source of error and "the size of the settlement was commensurate with the seriousness of the injury." The study concluded that "These results should help to reassure physicians who are concerned that the tort process itself is unjust. Frivolous claimants do not, as a rule, prevail."¹

Rather than seeking large settlements, most injured patients sue for other reasons.

- Lack of Communication -- What Really Happened: According to a recent survey of 137 families who filed suits against physicians, the primary reasons for pursuing litigation were to find out what happened.² Poor communication by medical personnel with the patient was often cited by respondents. In addition, a prior relationship with a medical provider did not protect the provider from legal action. Physicians are finding that apologizing reduces litigation and promotes quick resolution of claims. Douglas Phillips, President of the Physicians Insurance Association of America, said that "Communicating with the patient is probably the most important aspect of loss prevention."³

Very few incidents of medical negligence result in a claim.

- Few Negligently Injured Patients Receive Liability Compensation: Only one in every ten incidents of medical negligence result in a liability claim, and only one in twenty-five receive compensation through the liability system.⁴ Is this evidence of litigiousness -- that 70 or 80 percent of the people injured by an incompetent or negligent act do nothing about it?

Elderly and minority patients are at a greater risk of being injured by medical negligence.

- Increased Risk of Being a Negligence Victim: In a study of New York hospital discharges, patients with the highest risk of being injured due to medical negligence included elderly patients, minority patients in hospitals that treat a high proportion of minorities, patients in

government-operated hospitals and patients in non-teaching hospitals."

PHYSICIAN DISCIPLINE SYSTEM DOES NOT REMOVE BAD DOCTORS

The cause of medical negligence is medical negligence -- negligent doctors committing preventable errors.

- New York Study: A Harvard study reviewed 30,121 hospital patient discharges from 51 New York state hospitals in 1984. Of these, 280 patients included an adverse event which was caused by negligence. It is estimated that 27,177 cases of medical negligence occurred in New York during 1984, resulting in 6,895 deaths and 377 instances of severe permanent disability. Only 1 in 5 injured patients filed suit and only 1 in 16 received any liability compensation.³

- Many Deaths are Preventable: Physicians reviewing 162 hospital deaths in 12 hospitals found that in at least 144 of the cases examined, the deaths could have been prevented. In addition, a small number of factors caused most of the preventable deaths.⁴

A small number of physicians are responsible for most of the negligence.

- Florida: 44 of the physicians practicing medicine in Florida have had 2 or more liability claims filed against them. This group is responsible for 40% of the total claims paid out from 1973 - 1985.⁵

- Illinois, Pennsylvania and Texas: 21 of all physicians practicing in Cook County, Illinois (sued 6 or more times) were defendants in 36% of the medical negligence litigation from 1971 to 1986. 57% of the physicians were not named in any lawsuit and 79% of those sued during this period were named only once or twice.⁶ Studies in Pennsylvania⁷ and Texas⁸ had similar results.

Medical disciplinary boards do a very poor job of regulating physicians.

- New York: The New York Office of Professional Conduct takes an average of 216 disciplinary actions annually compared to an estimated 27,000 cases of medical negligence occurring each year.

- A National Disgrace: An estimated quarter million injuries and death resulted from medical negligence in American hospitals in 1988. Medical disciplinary boards in the U.S. issued an annual average of only 1,481

serious disciplinary actions against physicians from 1987 to 1990.⁵

MEDICAL NEGLIGENCE INSURANCE -- COSTS AND PROFITS

Medical liability insurance is less than 1% of the total cost of health care.

- Premiums vs. National Health Care Costs: Insurance companies argue that liability expenses are a primary factor in skyrocketing health care costs. The facts refute this allegation. In 1989, medical negligence insurance premiums in the U.S. were \$5 billion.⁵⁵ National health care expenditures for 1989 were \$604 billion.⁵⁶ Thus less than 1% of the national cost of health care can be attributed to medical liability premiums.

- The Texas Experience: A recent study commissioned by the Texas Hospital Association, the Texas Medical Association and the Texas Trial Lawyers Association concluded that medical liability costs -- insurance premiums and damages from lawsuits -- make up less than 1 percent of health care expenditures in Texas, consistent with national findings. The study found that reforming the medical professional liability system would have minimal cost savings impact on the overall health care delivery system in Texas.⁵⁷

- Losses Paid vs. National Health Care Costs: Nationwide, only 4% of medical negligence insurance premiums earned -- \$2.14 billion or one third of 1% of the cost of health care -- were paid out for all losses in 1989.⁵⁸ Insurers are retaining 96% of the premiums earned.

Medical negligence insurance is highly profitable for both private and physician-owned insurance companies.

- National Data: In 1989, the net profit of medical negligence insurers in the U.S. was 27.3 cents for every dollar of premium earned. From 1985 to 1989, insurers' annual average profit on medical negligence insurance was 9.2% of premiums earned.⁵⁹ Between 1985 and 1990, the net worth of medical liability insurance companies more than doubled from \$835 billion to \$1,691 billion.⁶⁰

- Minnesota Study: A study of medical negligence closed claims from 1982 to 1987 by the Minnesota Commerce Commissioner found no increase in claim frequency, loss payments and loss expenses. Yet, premiums tripled resulting in a determination that St. Paul Companies --

the nation's largest medical liability insurer -- was substantially overcharging policyholders. St. Paul agreed to refund \$1.5 million to physicians in Minnesota.³¹

- Physicians Sue Insurer For Excessive Premiums: In 1989, physicians in Colorado won a \$4.1 million judgment against PHICO Insurance Company. The court found that the insurer created a sense of crisis and panic to justify a large premium increase.⁶² Physicians in Virginia also sued PHICO for illegal conduct when the company canceled thousands of doctors policies in 1986.

- Physician-Owned Companies: An investigation by the Arizona New-Times revealed that MICA, a doctor-owned company, paid out only 30 cents of every dollar it took in. In addition, the company received a 36% rate hike in 1987. Despite a reduction in lawsuits in 1987 and its own data showing claim frequency decreasing, the company still projected increased lawsuits for 1988.

MEDICAL NEGLIGENCE RESTRICTIONS ARE NO SOLUTION

Tort restrictions will not resolve the problems of access to health care.

- The Tail Wagging the Dog: Due to the high cost of health care, a large number of Americans have no health care coverage. Blaming medical liability costs, which are less than 1% of the cost of health care, for the problem of health care access is ludicrous. Altering less than 1% of the health care costs would have no significant impact on the total cost of health care.³²

- Reasons for Costs of Medical Care: There are numerous reasons for the increased cost of medical care, including technological advances, increases in population, increased wages as well as general and medical inflation. In a recent GAO report, medical liability costs are not even mentioned as a contributing factor of increasing health care costs.³³

- Restrictions on Compensation Don't Work: Conventional wisdom about medical liability is not supported by the facts. Limits on verdicts and attorney's fees will not curb the incidence of litigation. Nearly 80% of the injured patients receiving liability compensation have economic losses which exceed the compensation received. This percentage is even greater for settlements. Limits on compensation will only exacerbate the current short fall.³⁴

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ALEC Proceedings



*The Remarks of the People Setting the Terms of the Debate
for the States and the Nation*



Congressman Henry Hyde ♦ Congressman Charlie Stenholm ♦ George McGovern ♦ Virginia Governor George Allen

Honorable William P. Barr ♦ CORE Chairman Roy Innis ♦ Congressman Jon Kyl ♦ Congressman Tim Penny

Texas Comptroller John Sharp ♦ Jersey City Mayor Bret Schundler ♦ Wall Street Journal Editorial Writer John Fund ♦ Honorable Edwin Meese, III

Arizona Governor Fife Symington ♦ Congressman Dick Armey ♦ Congressman Joe Barton ♦ SCNE President Robert L. Woodson

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THE HONORABLE HENRY HYDE UNITED STATES HOUSE OF REPRESENTATIVES

As one of the founders of ALEC, Congressman Henry Hyde (R-ILL.) was given the honor of convening ALEC's 20th Annual Meeting. In his remarks, he spoke of restoring the "culture of democracy" to America, stating his belief that people have developed a cynicism about Congress largely due to the way campaigns are run. Hyde explained that legislators must protect the inalienable rights of everyone, not just a few, and that freedom is what sets America apart, and has made it the envy of the world. He stressed that effort is required not only by legislators, but also by the electorate, to maintain and protect our tremendous freedoms.

Good morning. Thank you. It's my honor to call to order the 20th Annual Meeting of the American Legislative Exchange Council. As a founding member of ALEC, I am really delighted to be here this morning. I have been asked to say a few things about ALEC and the challenges facing all of us as legislators.

I think it's true that most of our institutions are in crisis, as far as the public perception is concerned. Certainly in Congress we are greeted with cynicism, if not contempt, and as we look around we see phenomena that indicate a great dissatisfaction by the public as far as legislators are concerned.

I think the Ross Perot phenomenon is an example of people who are distressed and dissatisfied with the current state of affairs, and who look with great suspicion and cynicism at their elected leaders. I think the term limits movement is another indication of the public's perception that, somehow, service in a legislative body is corrupting. I believe that perception underestimates the complexity, the great inherent difficulty, of trying to balance the equities between your constituency, between your state, between the country, and between your conscience.

We're all familiar with Edmund Burke's famous letter to the electors of Bristol, where he told them that while a legislator's highest fidelity is owed to his constituency, his conscience is owed to no one. And so we struggle with that constantly, trying to do what's right, and having the age-old dilemma of trying to find out what's right, being a most difficult thing.

But I think in terms of contributing to the public cynicism about legislators, many times we are to blame because of the way we conduct campaigns. There's a definite loss of civility in political interchange. We attack the institutions. We, in Congress, run against Congress, saying that "I am not like others." We are the original Pharisees; the other guys are bad, but I'm Pericles reenacted.

And, of course, all of this has its effect on the public, and I don't think it's healthy. I don't think the rule of law is surviving. I think we need a new culture of democracy. We need to understand that effort is required not only by ourselves but by the electorate as well. We have to make them care about the issues, about the candidates, and make them take the effort to register and to vote. We have to again insist that the state exists to serve society; not the other way around.

And we all must be willing to defend the inalienable rights of everybody, not just some people, but everybody. We have to restore the link between rights and responsibilities. I think that the greatest of all documents that preceded our Constitution was the Declaration of Independence, which is our

country's birth certificate. It says, in so few majestic words, where our rights come from...they are inalienable and they are an endowment from the Creator. And I think these things are important.

I think we all have to understand that causes exist for which we are willing to lose our office. Things that are important to us, to our consciences. We are not simply ombudsmen, but we are people who are here to bring a vision and a sense of values to our job.

I well remember in January of 1978, the Illinois Congressional delegation was invited to Lincoln's Memorial in Washington to act as an honor guard for the Vice Premier of China, Deng Xiaoping, who was making his first visit to America. He was going to place a wreath at the feet of the Great Emancipator.

And I wanted to see this little man, who is about five foot two, 72 years old then, a very sprightly, energetic person...because he represented one billion people and 3,000 years of history. I wanted to see what he looked like and to enjoy the moment of seeing somebody who represented a billion people and 3,000 years of culture that our country didn't have.

And as he came along, and I shook his hand, I thought to myself, what does he want from our country? What does he want from America, which is about 200 years old, lacking the cultural homogeneity of China. A country made up of Greeks and Poles and Mormons and Catholics and Baptists and atheists and agnostics and blacks and Hispanics and Swedes, and all sorts of types of people and cultures, who have come to America to make this country what it is.

And I thought of the sign language term for America, which is a perfect example of the melting pot. And I asked myself why would this great country, with its tradition and its culture and its history...why would it come to America for anything?

And it occurred to me: He wants us to drag his country two centuries into the 20th and nearly the 21st century. He wanted access to our universities, access to our technology. He wanted trade with the United States. He wanted America to bring his country forward into the modern era.

And does it occur to you why we have these things and his great country does not? And all of a sudden it dawns on you: There's a one word answer...freedom. America's great freedom.

The fact that you can be born in Spokane, Washington, and go to school in Pensacola, Florida, shows the mobility of this country and the accessibility of information. The junior colleges, the colleges, the libraries, the media, the explosion of information, the opportunities that are available to anybody in this country who has the energy, the will and the desire to make something of themselves.

It is this tremendous freedom that has given this country the standard of living that is the envy of the world. The creativity that is the envy of the world, and that other countries try to emulate. So freedom, which was so painfully won for us and so painfully maintained, is the distinguishing, the defining feature of the United States of America from the rest of the world.

And so we have a role in the maintenance of that freedom and in the enhancement of that freedom. Charles de Gaulle once said France would not be true to herself if she weren't engaged in some great enterprise.

Well, we're not true to ourselves if we're not engaged in some great enterprise. But every member of every state legislature, and every member of Congress, every member of a city council, and of a library board and a zoning commission, are engaged in the great enterprise of governance. Liberty, under God, with freedom for all, which is indeed a great enterprise. ■



ARIZONA GOVERNOR FIFE SYMINGTON

Arizona Governor Fife Symington addressed the explosion of civil lawsuits and the desperate need for tort reform in the states. He notes that a system that had once relied on specific contracts that people honored has evolved to a system where the obligation of the parties are intentionally obscured. As jury verdicts become larger and more frequent, Symington notes that the economy suffers because products and services cost more. Symington also addresses the human toll of a deteriorating civil justice system, believing that we have become more "contentious, litigious, sensitive and intolerant," as a culture. Symington believes the work that has been accomplished in Arizona in tort reform is an example of what other states can do to restore their civil justice system.

Thank you. It's great to be here. And members of ALEC, congratulations on your 20th anniversary.

I am really blessed as a governor to have an extraordinary group of individuals in our legislature, in our leadership in the legislature, who really work well together. We focus on issues well together, we plan ahead. We do things that frankly Arizona hasn't seen in twenty years, and I'm very, very proud of the leadership. It's extraordinary because for many years we have been unable to have short, productive sessions; we've had long and, I think, sometimes very unproductive sessions. But this year I believe is the first time in some twenty years, Brenda, (Ariz. Representative Brenda Burns) that we got in and out in about ninety days and we passed our budget in 65 days.

The year prior to that occurrence we went right up to our constitutional deadline of June 30, and had what some would refer to as an altercation at the end because I wanted to have tax reduction. My fellow believers in limited government and reduced regulation in the legislature wanted to have a tax reduction, but we couldn't get it through the Senate, and so we were within hours of shutting state government down. We had the National Guard ready to take over public safety and the prisons, and we were going to literally close our state government down because, unlike California, we don't issue warrants, we can't keep going, we've got to close. And I remember having a conversation with Brenda; Mark Killian, the Speaker of the House; and John Greene; and Tom Patterson in the Senate, and I looked at them and I said, "You know, my greatest fear is if we shut government down we're not going to be missed."

Well, fortunately, we didn't have to shut it down and we got our budget passed, but it was really tough. But it happened. What's happening in my state is happening because of teamwork, because of integrated planning between the executive and the legislative branches, and because people of common ideology are working towards a beneficial end.

I think we're all really concerned about the issues around tort reform, even though it can be a very dull and dry topic. But I think it's really important and I want to share my thoughts with you about tort reform and how we can continue to be on the offensive on this issue.

Before I launch into my soliloquy, though, I would like my wife Anne, the First Lady of Arizona, to stand and take a bow because she's gone down this road with me for a few years.

But wouldn't you know on the airplane here, as we were landing in Chicago, the person I was seated next to, asked me, "Well, what are you doing?" He saw me reviewing this speech. He says, "Where

are you going?" I said, "Well, I'm going to give a speech on tort reform." And he said, "Well, why are you doing that?" I said, "Well, I'm the Governor of Arizona and I was asked by ALEC to go give this speech." And he said, "You know, I don't like lawyers." And I said, "Oh, really, yes." He said, "Well, if you see a lawyer and a politician in a pool and both are drowning, but you can only save one, what would you do?" And I looked at him and I said, "I don't think I want to answer that question." "That's right," he said. "What you do is — you go shopping."

So as you can tell, lawyers are not in favor today, though I know many fine lawyers. So as I give you my few lawyer jokes here I want you to take them gracefully. No insult is meant. But I looked high and low to find something that we all have in common, and finally I ran across a headline in this paper regarding this issue that said, quote, "High-priced bull," unquote. And what could be more appropriate in a discussion of tort reform. It turns out that this story had absolutely nothing to do, really, with politics, and everything to do with tort reform. The bull in this case referred to the real-live thing with the ring in his nose, fire-breathing monster on four legs, and it was a prize bull that this fellow owned and a farmhand who did not speak English was charged with taking care of this bull.

Unfortunately, a pesticide was used. The pesticide warning label was in English. Ultimately, the bull came into contact with the pesticide and was poisoned and died. Well, as luck would have it, the bull was not just any bull, it was a prize bull. And since it was a prize bull its owner felt compelled to sue for the great loss that he suffered. And, of course, he couldn't sue himself and he couldn't sue his farmhand, because there would be no profit in that. So he searched for the deepest pocket and he sued the pesticide manufacturer.

Now, the owner's lawyer proceeded under the theory that it was reasonably foreseeable that a person using the product could not read the English warning label. Sound like bull to you? Maybe so. But the owner walked away from court with an eight-and-a-half million dollar judgment. And that's what high-priced bull is all about.

I don't know if that's justice or not. I'm reminded of the story of a law partner who went away on vacation and left his associate to complete the case and when the associate won the case for his client he wired his partner who was on vacation in the Caribbean and said, quote, "Justice has just triumphed." And the vacationing lawyer then wired back to his associate and said, "Appeal the case."

Well, on a more serious note, I'm here to talk about the gradual transition of our civil justice system from one that relied on contracts to one that is now ruled by tort law. But the misfortune, I believe, of that transition is the gradual deterioration of individual responsibility and the logical erosion of individual liberty.

You see, in contract law it's a well-accepted principle that each party enters into an obligation and then fulfills that obligation. Each person knows his duties and privileges from the outset. If someone fails in his obligations he is made to pay damages to the other party in a sum and manner that would be as good as if the obligation had been met. No more, no less.

Now, tort law, on the other hand, is a system where obligations are intentionally obscured. Nothing is known up-front, and compensation has little to do with injury. At its best, tort law is a fault-based system subject to severe manipulation.

In Arizona, we're very fortunate to have a legislative majority that saw the injustice of our tort system and was willing to undertake the arduous task of reforming it. It hasn't been easy. It's a battle that's been going on for years. In this room is Senate President John Greene, who led an aggressive effort to enact the strongest tort reform possible in Arizona history within our severe constitutional limits.

And I'll tell you, the battle was so tough that you noticed he's carrying a cane around and he has a little limp in his right knee.

One of our nation's most articulate spokesmen on the problems brought about the decline of our civil justice system is Peter Huber, and I'm sure many of you have read his book. He has quite aptly labeled the costs imposed by litigation, the "litigation epidemic," as a hidden tax. Well, I don't think it's so hidden, but it certainly is a tax. It's a cost that's built into every product and every activity. It's a cost that's resulted from a civil justice system that has gone wild at the hands of a few of its less scrupulous practitioners. This hidden tax takes, frankly, all the fun out of running a business in modern-day America. It's sucks the very wind and life out of every instinct to compete, out of every incentive to work harder or to do better. In short, it has the gloomy effect of crippling the marketplace.

Now, we have read in the newspaper about larger and more frequent jury verdicts. Americans no longer bat an eye when they see multi-million dollar judgments. And it is not surprising there are just too many of them, day after day that we read about. According to Mr. Huber, the first jury verdict exceeding a million dollars was delivered in 1962. In 1975, there were fewer than twenty. But in 1991, American courtrooms saw 750 verdicts of a million dollars or more. In addition to their frequency, the dollar amounts of punitive awards have increased sharply in recent years.

Now, a study of punitive damage awards against businesses in California, Florida, Illinois, New York, and Texas concluded—and I'm using his words—"that the awards were 89 times greater in inflation-adjusted dollars from 1988 to 1991 than they were twenty years earlier in the period 1968 to 1971." But the size and frequency of the awarded damages seem almost logical in comparison to the way liability is assessed.

In an essay, Mark Pulliam of the Golden Eagle Club provides these examples. A jury ordered a restaurant to pay more than \$3 million to a patron who was stung by a bee. A New York man who deliberately leapt in front of a subway train sued the city and recovered \$650,000.00 because the train didn't stop on time. A Philadelphia jury awarded a woman almost a million dollars because she claimed a CAT scan had interfered with her psychic powers. But as Mr. Pulliam recognizes, these are not isolated phenomena. Consider these statistics. The Rand Institute for Civil Justice estimates that operating costs alone for our civil justice system are greater than \$2 billion a year. The liability component of litigation, all by itself, amounts to \$80 billion per year. That's about equal to the total profits from the top 200 U.S. corporations. Up to \$300 billion is spent each year in order to avoid liability. The overall cost of the American tort system equals approximately 2.3 percent of our gross domestic product. Four decades ago it was .6 percent. Now, obviously something has gone wrong.

To make matters worse, litigation is an inefficient way to compensate for legitimate injury. For every dollar spent on legal action, less than 50 cents goes to the prevailing plaintiffs. We live in a country where one out of every ten adults was involved in a lawsuit in 1982. One out of ten. The sorry result, as Mr. Pulliam notes, is that surging liability insurance costs, huge legal bills, large settlements, and unpredictable jury verdicts impose a heavy tort tax on every business in the country. And this leads to costlier goods and services, fewer jobs, and less investment.

The United States is having a tough time now competing in the global marketplace because of the restrictions placed on research and development. Our foreign competitors, though, often have a cost of product liability insurance that's up to 50 times lower than the United States. But the reality is that plaintiffs' lawyers aren't the only ones in the game. After all, for every plaintiff's attorney there's at least one plaintiff and six jurors. People just like you and me. And since these people are filing about a quarter of a million lawsuits each year, and regularly rendering seven-digit jury verdicts, maybe a little self-evaluation is in order.

Could it be, as Mr. Pulliam suggests, that part of the blame must be assigned to a deterioration of our shared cultural values of individual responsibility and self-determination? Could it be that the explosion of our tort system, like the expansion of our taxing structure, has coincided with a phenomenon in our society of failure to accept individual responsibility? In another query that I share, Mr. Pulliam ponders whether qualities such as resilience, toughness, forbearance, and the ability to withstand adversity, have been subordinated in favor of a get-rich-quick mentality fueled by greed, envy, and self-interest?

The emerging attitudes seen by Mr. Pulliam conclude that life should be free of risk, that no misfortune occurs in the absence of blame, and that no injury should go without compensation. In the absence of either a social ethos or a transcendent ethic to confront adversity, litigation has become both a proxy and a shortcut to innocence, meaning and justification. Simply put, "If something has gone wrong, someone must be at fault and it sure isn't me."

Well, now, what has this done to the soul of America? People have unquestionably become more contentious, litigious, sensitive and intolerant, and have become less cooperative, harmonious and forgiving. That's the end result. That's where we're headed. If this is the case, I think we ought to revolt. That's a strong word. But it's a dangerous road we're going down. We must restore some justice to our civil system. And in Arizona we've begun to do exactly that with the tremendous leadership being asserted in our House and Senate, and backed by the executive branch.

We passed the 1993 Tort Reform Bill and it has eleven key provisions. We've granted immunity to volunteers. We have significantly reduced the liability of landowners who allow their property to be used for educational and recreational purposes. We've established a system of comparative negligence, and now have a twelve-year statute of repose. We have reduced the barriers to communication between defendant and plaintiff's doctors. We have made it tougher to successfully sue providers of emergency medical aid. Insurance companies can now place liens against proceeds collected from third parties. Criminals who were allegedly injured during the commission of a crime can no longer bring suit.

We've expanded our collateral source rule to apply to all personal injury actions, and we now allow for the periodic payments of future damages. And we now allow people to choose between insurance policies that provide for multiple recovery and less expensive ones that do not. Finally, because the state, as much as any entity, was prey to unreasonable lawsuits and bankrupting damages, we addressed public sector liability. That's a tough one, but it had to be done. Arizona was second only to New York in paid tort claims. Millions of taxpayer dollars were spent to pay for injuries occurring on the state's highway system. Millions more were spent to defend lawsuits brought by drunk drivers or the users of illegal drugs.

The "suits against the state," a provision of Senate Bill 1055 ended this madness by granting additional qualified immunity to the state. And as I remind my friends all around our state who've talked about this issue, they're the ones who pay in the end. The state doesn't make money. The state takes money out of your pocket, the citizen's pocket. And when these lawsuits go against the state, it's going to go against your pocketbook. And you've got to get down in the trenches. You've got to talk that way to people. You've got to make people understand that when these lawsuits are successful against the state, it's going to do great damage to the economy, potentially to them, and it could cause tax increases depending on the cumulative size of all these judgments. This bill also established a one-year statute of limitations for filing against the state.

Well, all of this is now Arizona law. But our trial attorneys are already mounting a new attack on the progress that we have made. They are now putting together a number of provisions to present to the voters by initiative this coming November. And basically what they've done, is that they have gone out with paid circulation people and bought the signatures to hold up certain provisions of this tort reform

law. So the battle is beginning to be joined. We're expecting a lot of glitzy propaganda from PITMA advocating their views.

I would be very interested to hear suggestions on how to defend against this attack on the state budget from those who come from places like Alabama, Texas, North Dakota and Mississippi. People who, like us, have fought hard to bring some order to the civil system. And I would especially be interested to hear how you dealt with paid petition circulators. This is a practice that I believe undercuts the philosophy of initiatives. I think we need to look at ways to limit the use of this vehicle when it is employed in a manner that is really contrary to the spirit of democracy, the idea of a grassroots political movement.

This might be one way to battle the ever-increasing pressure that we have felt from the plaintiff's bar. Seven years ago, 63 pieces of tort reform legislation became law in 21 states. Four years ago, the numbers dropped to five in five. Those of us who are dedicated to restoring justice to our civil justice system must band together. For those states now contemplating tort reform, I do have a few brief suggestions.

Our legislative session began in late January, but a solid tort reform effort began long before the session. Not much can be done legislatively without good legislators. And as I've said, we're very fortunate in Arizona to have people like John Greene and Tom Patterson and Larry Chesley and Matt Salmon in the Senate, and others like Pat Blake and Bob Burns and Brenda Burns and Lori Daniels and Gary Richardson in the House. And I saw Carol Springer here, who's the head of Senate Appropriations. We have a great team, and they're willing to take the heat, they're willing to stand up in the face of the onslaught that we all know is coming on this tort reform issue. But in order to achieve significant tort reform, the right people must be given the vote. So the first key is to put good people into the legislature. That's the first big step.

And then make tort reform a campaign issue and go on the offensive. Don't be put on the defensive. Carry the standard into battle and have your counter-arguments ready and go right at these people. Force candidates to express their views. Unless he or she is bankrolled by the trial lawyers, they're going to be in favor of improving the civil justice system. This is a battle between the good guys and the bad guys. That's how I view it. Get the help of real people like Bill Jones in Arizona, who's our own quintessential good guy lawyer. Yes, believe it or not, there are many of them out there. Find an attorney who's represented an innocent landowner found liable for trespassers' accidents and forced to sell his property to pay the judgment. Put him on television. Find one who represented a small businessman who had to file for bankruptcy because he was ordered to pay for something that he couldn't control. Find an attorney who's watched a compassionate physician hang up her stethoscope due to the cost of malpractice insurance.

My own mother, who's quite elderly and infirm, is being taken care of by a wonderful lady whose husband worked for forty years building a business in Arizona. He sold it and they ended up in litigation. The group that they sold it to turned around and sued them under the RICO statutes. They've done nothing wrong and they won their lawsuit. These people filed for bankruptcy and this lady's husband died from all the stress and strain, and she was left destitute. After forty years, the equity in the business was wiped out under this system of American justice, and I don't like that. I think that's wrong and I think we need to change it.

If you put the good guys up against the bad guys and force them to debate the points, I believe the good guys will win.

Once the issues are exposed, the motives are easy to discern and the few will no longer have the edge against the many. And I invite any of you who are interested in more detail about our reforms to

talk with Barry Aarons, our legislative liaison, about our strategies as we go on the offensive on this issue. A just civil justice system is necessary in order to maintain important individual rights. We've come a long way in Arizona to send a message to our citizens that the executive and legislative branches of government will not impose unreasonable taxes, and this is part of it. We now must insist that our third and non-elected branch of government does not do so.

You see, in Arizona we had, prior to my coming into office, \$518 million in tax increases in the four years preceding my term. There was a myth spawned by the political opposition that we were suffering from a structural deficit. And I disagreed with that. I didn't like all the tax increases and the growth of government in my state, and that's why I ran for this office. In the 1980s, state spending grew faster in Arizona than any other state in the union. The economy was sagging, citizens were calling out for lower taxes and better government.

Before taking office, I was the president of a small development firm in Phoenix, and I became well acquainted with what it takes to run a good business. And I wanted to introduce some of these private sector concepts into the struggling public sector. And I told voters that I would right-size government, make it more efficient, more responsive and less costly. I came up with an acronym for my program, Project SLIM, which stood for State Long-term Improved Management. In concert with this effort, I would attempt to keep regulation at a minimum to avoid imposing unnecessary expenses. Most importantly, I told voters that I would lower taxes so that individuals could spend more of their income as they wished and businesses could survive and prosper.

My ideas were, as you can imagine, ridiculed by many in the journalistic profession. But I'm pleased to report to you that the people of Arizona were receptive to these ideas. Over the past two-and-a-half years, we've watched while these ideas have become law and now they've become a way of life. We have really changed attitudes, both within government and outside of government. During my first year we held the line on taxes. I took office late in my first term because I had to suffer through a run-off election. I don't recommend that for any of you in this room, by the way. That's one law we did repeal, thank God.

During my second year, taxes were cut by 16 and a half million dollars. I know it doesn't sound like a lot, but believe me, I figured out the best way to avoid a tax increase is to ask for a tax decrease.

This year they were decreased twice that much, and through fiscal year 1998 we have approximately \$400 million in cumulative tax decreases on our books, which is going a long way to offset the damage that was done in the late '80s. But what's more important, this is the first year in memory that we have had a surplus in our budget—a \$65 million surplus for this fiscal year. And we finished our year without having any mid-course corrections in our budget. That's because the legislative branch and the executive branch worked closely together to craft a budget that was good for all of Arizona, not just for Arizona state government.

We have a message for Washington. We lowered taxes and our revenues increased into state government.

Those who don't believe supply-side economics works need to study Arizona, because our economy has turned sharply for the better. We're on the mend, and it's because of proper fiscal management at the state level. My only fear is that what's happening in Washington and at the federal level will undo a lot of the good that we've done at the state level, and I personally find that very frustrating. We're also sending a message to businesses that Arizona is a good place to locate, and that's important. I refer to Jack Kemp as my coach. I like Jack Kemp's policies. And he has one famous line he likes to give in his speeches. He said, "Before you have employees, you have to have employers." And if

you're going to have employers, you have to have people willing to come in and invest their capital, and you've got to condition the environment for that type of activity." That's just exactly what we're doing in Arizona. It doesn't take a rocket scientist to figure it out, and we're seeing the results of that now as our state turns an economic corner.

Well, the message is being picked up. From the fourth quarter of 1991 to the fourth quarter of 1992, Arizona tied with Florida and Idaho for first place in percent of revenue growth. And last year, we had over 50 new companies which moved to Arizona, bringing 13,000 new jobs with them. And though Pete Wilson is my friend, I did take a lot of those jobs from California. I apologize.

But we've made Arizona a good place to set up shop. We have a solid labor force, a hospitable culture, and a statutory tax structure that promotes commerce. With all of this, it's easy to see why tort reform was so necessary, because so much harm can be done in this area. It can just devastate your economy. It can devastate people's attitudes towards investment and taking risk. And in America, we're famous for taking risks, for taking a chance. We're an entrepreneurial culture. We had to let prospective Arizona businesses know that there would be no hidden taxes in our state. We had to let them know that we are no longer enslaved by the threat of civil litigation. We had to let them know that they can compete, they can participate in the marketplace, and that they can keep more of the profits that they earn.

In the end, though, our real message is philosophical. We are a state that welcomes, celebrates, and rewards individual responsibility. We have a new appreciation for the art of the possible. We know for certain that we can have good tort law even under severe constitutional limitations. We can have committed leadership and aggressive help from the private sector, to use the power of government to increase, not diminish, individual liberty, and to promote a common prosperity for all people.

I wish you all the greatest success as you take up similar challenges in your state. God bless you, and thank you. ■

20TH ANNUAL MEETING
AUGUST 1993
TRAVERSE CITY, MICHIGAN



**MAYOR BRET SCHUNDLER
OF JERSEY CITY, N.J.**

Power, and who has it, is the topic of Jersey City Mayor Bret Schundler's remarks. His message is that there is a temptation for every level of government to amass power for itself, which then it rarely relinquishes. He uses school vouchers as an example of an appropriate way to convey power to the people, because he believes that giving vouchers to parents will give them the power to solve problems that government cannot. Schundler gives a new perspective of a political system that has

been corrupted by political self-interest and power.

I want to tell you that I'm very honored to speak with you because you represent state legislatures across the nation. And I believe that the state and local levels is not only where governmental power belongs, it is also where it actually exists, if we choose to use it.

Ronald Reagan talked about the New Federalism, and I think he was absolutely on the mark with regard to the way we should devolve power more into local hands. In a place like Jersey City, that kind of a phrase doesn't really mean anything to the people on the street. So what I talked about in the course of my campaign wasn't an ideal like the New Federalism, but I just simply said, "Don't you think that you should have the control to make these decisions over your own life? Don't you think government should really put power in your hands?"

And I have to tell you that we've gotten some notice because Jersey City is not a place where it seems natural for a Republican to win, campaigning on the ideas that I campaigned on. But that is an incorrect political analysis. The most natural place in the entire United States where you can find people who want power to be put in their hands is a place like Jersey City...or, for that matter, the south Bronx. Because where else are you going to find a population more jaded when it comes to politicians promising all the good things that they are going to do for you?

The people in Jersey City don't need to be told that power corrupts and absolute power corrupts absolutely. They know it firsthand. Jersey City has been in many regards the model of the machine city in America. I can't tell you how many people from Texas and California say "Yes, when I was in college we read about Poly Sci., we read about the Hague machine in Jersey City." And it's the truth. The Hague machine was the epitome of machine politics in America, and I think it has a lot to do with the despair that afflicts places like Jersey City and many of our Eastern rust belt cities today.

The more you devolve power and put it into the hands of people themselves, I'm convinced, the better.

Last Saturday I had a chance to appear on Jesse Jackson's "Both Sides Now" program. I was talking with Henry Cisneros, the new HUD Secretary, about President Clinton's proposals, and Secretary Cisneros got all excited about all the exciting programs coming out of Washington to empower our local neighborhoods.

I said, "Henry, this is just so ridiculous. You're telling me that Robert Reich is going to do this, and this Secretary is going to do that, and they're going to do that to empower our neighborhoods. If you want to empower neighborhoods, stop doing all this stuff. Just give a big tax credit for state taxes paid."

I said, "Some of our New Jersey dollars can stay in New Jersey. And we will take care of some of our problems ourselves."

The temptation is so great for every level of government to accrue power to itself. The temptation for the President is, I'm sure, tremendous. And it is also a great temptation for our state legislators to accrue power to themselves that does not belong with them, but belongs with the people themselves.

The issue of where power is located is obviously the central issue when it comes to talking about school vouchers. School vouchers are not an educational reform; they are a revolutionary change in where power is located. What we're talking about here is putting power directly in people's hands. We're talking fundamentally about educational enfranchisement, just like the vote represents political enfranchisement. To allow people to search out the best for themselves, because we do not believe in benevolent dictators.

We know what the keys are to running an effective school. I picked up in 1991 the ALEC report on "Breaking the Chain," which had a nice speech copied from Bill Bennett. It was talking about effective schools research that took place in the 1970s and 1980s and it's absolutely great research. And one of the points he made was that we have tremendously effective schools all over this country. You don't have to build new models; they exist. We know what works.

But the issue is that there is no political impetus to implement what works, and there is a tremendous political impetus against it.

Clearly, the NEA is the most powerful political organization in the United States. If you go to every state capital in this country I would venture to guess that just as in New Jersey, you'll find the most expensive, most impressive office building to be the one in which your state education association is located. And when you read the article from "Forbes" magazine, it's not surprising why, given the financial resources that they command.

But I want to make this point, too. It is not wrong for the NEA or their state chapters to ask for the moon. It is their job. It is the fundamental job of a labor union to try to get as much money as they possibly can for as little work. That is their job. We shouldn't condemn them. They're not up for reelection, and when we're campaigning out there in the hustings, no one has a chance to vote against them; they're not the enemy. They're doing their job.

The people who are elected by the people to stand up for the people and balance that interest group are legislators themselves. That is where the power is, and that is where it belongs according to the Constitution. And that's where we have to be willing to use it for the sake of our country.

You know, it is also unnatural to assume that a legislator who has any political self-interest is going to stand up to an organization as powerful as the NEA. So it is not wrong for the NEA to push for the moon and it is unnatural to expect a legislator not to go along.

That is an example of a system that is irreparably a failure. When you set up a system where morality is unnatural, you have a problem. And the only way to make the system work is to put power in the parents' hands because parents don't stand for elections. They don't have to worry about money being poured into the coffers of their opponent and people ringing doorbells against them.

That is the only way to get out of this problem we face. Reform will never work. We look at the situation in New Jersey where Governor Kean had the courage to put through a state report card on each of our districts so there'd be some small measure of accountability as to how well the district was doing. Right away, Governor Florio comes in and that doesn't exist any longer. So we've seen a lot of

political pain as we fought to have that report card instituted, but no gain because it was quickly overturned. And if we don't change the way this system works, it will always be that way.

If we do give power to parents, they will never, ever give that power up. I have to tell you, I truly don't believe that most legislatures will give that power up themselves. The way this is going to happen is that legislators, like yourselves, who know the answer and have the courage, are going to mobilize the people and the people are going to take it.

I don't think in history we've ever seen examples of people giving up power. What we have seen in the history of revolution is that people take power. And we can be instrumental in helping to mobilize them, to make them see what their interests are so that they demand that power.

And that is the political fight that's worth fighting. Can you imagine the American Revolution simply to get rid of the Stamp Act, and all that blood shed simply to repeal one oppressive piece of legislation, but leaving King George in power?

Well, that's what we do when we fight to get a state report card. Or, for instance, in New York City when we fight to get a better superintendent's contract. We spill political blood for nothing. The fight that is worth fighting for is the one that fundamentally changes power relations in a way that is permanent. And if you give power to the people to let them seek out the best education possible, they will never let it be taken away again.

Can you imagine going into a place like Jersey City where we have a poor population...\$10,000 per capita average income...where only 40 percent of our people graduate from public high school...where we do have a significant drug and a welfare problem. Can you imagine going into that city and saying, "You people just don't have it together, so we're going to take the vote away from you because you're not smart enough, you're not self-disciplined enough, you're not rich enough, and you're not white enough?" There is no way you can ever take the vote away from the people of Jersey City. They will throw you out of office before they'll ever let you take it away.

And if you give them educational enfranchisement, just as we have in America given political enfranchisement, they will never allow it to be taken away.

So through this reform...fighting this one good fight...political leaders will mobilize their constituencies so that parents can fight and beat the NEA in the election to come. Parents will win again, because you will have given the people something that they will fight for. Something to hold on to. And they will stand up for a legislator who has given that to them. And that legislator now will have been able to do what he believes in, or she believes in...what is morally right, and they will win elections. That's the way the system should work. When you do what is right, you win. Not that you lose, as is the case today. That when you stand up to fight for parents, you win.

Now, I'm convinced that in the future, when this is effected, the NEA will spend most of their time negotiating with school management, and they'll be similar to a labor organization in the private sector. They have a role to play...to look out for the interests of their membership. But in a competitive environment they have to keep an eye on performance because, otherwise, they will be out of business and their members will suffer.

That is the balance that is missing in the system today. In a competitive environment, both management and labor will still have conflicts, but they will both have to keep an eye on the competitive performance result. And that's the way it should be. In fact, I'm convinced that in the future the NEA will become the strongest force in America for regulatory relief of our public schools. They will be the found saying, "Get off of our back" ■



THE HONORABLE JON KYL
UNITED STATES HOUSE OF REPRESENTATIVES

As the health care issue was beginning to come front and center, Congressman Jon Kyl (R-AZ) framed the good and bad aspects of the current health care system. The message of Kyl's address was that we should strive to preserve the good -- the innovation, the technology, and the training of medical professionals, and seek to reform the bad -- high costs, the uninsured, and lack of portable coverage. Kyl gave a preview of the plans that would eventually be proposed in the 103rd Congress, and outlined the pros and cons of the single-payer plan, managed competition and Medical Savings Accounts.

It is a special pleasure for me to be here this morning and to be in the presence also of my colleague, Henry Hyde. As all of you know, Henry Hyde is one of the most influential members of the United States Congress and it's especially fitting that he could be with you here this morning.

My role is to briefly survey for you the various health care reform options that have been discussed in the Congress, with an eye toward identifying those proposals that are most likely to receive consideration when we return from the August recess after Labor Day. But I must confess that whenever a politician starts talking about reform, I recall a response of a literary character during the French Revolution, who said, "Reform, sir? Don't talk of reform. Things are bad enough already."

And with respect to health care, I think we might keep that in mind. Just as the physician's first admonition in treating a patient is to do no harm, a legislator's first obligation when considering reform is to survey the good and the bad, and to identify a course of action that hopefully will preserve the good while resolving the bad.

And, therefore, I think we should begin this morning with a brief survey of where we are in our health care in the United States. Clearly, with respect to the good, we can be proud. In terms of technology, the quality and technology of our nation's health care system is indeed the envy of the world. We have the most advanced medical facilities and the best access to high tech medical care anywhere. Our health care providers are the best trained. Nations from around the world send their best and their brightest to train in our schools. We have a private sector specializing in pharmaceutical and biotechnology research, which has produced equipment and drugs that have saved countless lives and ended the suffering of millions of people all over the world. And with respect to choice, we have the widest access and choice anywhere, more than in any other health system.

So whatever we do, we should not discourage the research and the training and the utilization of the most advanced technology, nor jeopardize the choice that most Americans enjoy.

Now there is some bad. As you know, national expenditures on health care have risen faster than in any other segment of our economy. Estimates are that the United States will spend some \$900 billion on health care in 1993, representing about 14.6 percent of our gross domestic product. According to the Congressional Budget Office, the federal government paid for about 45 percent of the total dollars spent for health care in 1992, so there's a tremendous pressure on the federal government to begin addressing this problem.

We know we have too many uninsured in this country, and there's too much of a reliance upon insurance from employers. There is a problem with portability, carrying insurance when you have to go to another job.

And getting back to the issue of cost for a moment, we have some specific cost drivers in this country, some of which are unique to the United States and some of which are not. Some of which are susceptible to legislative solution, some which are not. Our medical liability system I think is broken. Lewin VHI, a Washington based econometrics firm, estimates over \$35 billion can be attributed to the practice of defensive medicine, and over \$5 billion of excess malpractice premiums loading down our system.

We have little incentive for consumers and providers to be cost conscious, and I'm going to talk about that a little bit later on when we talk about the market based options for reform. There is almost free access in many cases to the highest tech services where the patient doesn't feel the pain of paying the cost. We have administrative waste. Estimates show in some cases as much as 25 percent of health care costs are spent on administration.

And demographics are a problem. In this country, two-thirds of the men and women...in fact, let me repeat this because I think this is just an astounding statistic...two-thirds of all of the men and women who have lived past the age of 65 in the entire history of the world, are alive today. And health care costs for older Americans average about four times that of people under 65 years of age. So there's a demographic cost driver here that's hard to deal with from a legislative point of view.

And finally, here in the United States, we have life style choices that present special problems. If you've seen the pictures of the crack babies or visited a trauma center on a Saturday night, you know there are some unique circumstances that cause our costs to rise beyond those in some other countries. So we do have our problems and, again, the challenge will be to preserve the good while dealing with the bad.

Before I discuss the five or six key options that have been presented in the Congress so far, let me also suggest two considerations to have in mind as we evaluate these options. First of all, there is, to some extent, a political disconnect. Consumers want more than anything else security of coverage. They want choice preserved, costs reduced, and quality sustained, while policy makers want to reduce national health care expenditures. Now handled properly, these goals can be quite consistent. Mishandled, American's will face Hobson's choices.

The second consideration is that central to the cost containment, is the question of who will manage utilization. Will it be the government? Will it be a health insurance purchasing cooperative, the employer, or individuals? How one addresses this issue has a lot to do with one's faith in government, or lack thereof, or one's faith in individuals to make the choices that are best for themselves and their families.

By and large, liberals believe that the health care market is too complex for most individuals to make those decisions and, therefore, that these issues are best handled by some level of government. A lot of moderates would like to continue the policy of relying upon employers to make these choices. Conservatives, on the other hand, believe that a well regulated and properly functioning insurance market, with individuals making the decisions produces the best balance between the competing goals.

When September comes and Congress gets back in session, there will be a whole variety of bills introduced. One bill, however, has already been introduced, and I'm going to start with this option. It is the option representing the most liberal point of view in the Congress. It is advanced by represen-

tatives such as Jim McDermott (D-Wash.) and Pete Stark (D-Calif.) and others. There's a bill pending right now for national health insurance which has about 87 cosponsors. I think it represents a liberal point of view in the House of Representatives, of perhaps a block of nearly a hundred liberal members, a block that must be contended with as we move forward. It is a single payor kind of program, similar to that found in Canada or Britain. And in our nation, it would be similar to enrolling all Americans in Medicaid.

I think most Americans are familiar with the kinds of problems that would accompany such a program. A rapid decline in the quality of care as a result of rationing and restricted access to high technology medical services. It represents the ultimate in managing utilization; basically, the government would ration the care.

And I think that you can say some good things about this. To support this idea, you only have to believe these four things: that taxes don't have an adverse impact on the economy, that price controls work, that monopolies are efficient, and that the government is a wise, compassionate and efficient distributor of goods and services. If you believe those things, then the single payor idea is for you. Enough of that.

I really don't mean to dismiss it quite so quickly, because the fact is that the President is going to have to deal with this liberal block of votes in trying to sell his program, and you saw what happened when he had to rely on a group of liberals in this last budget debate. We had to make taxes retroactive to pay for their programs and a lot of other things that Henry Hyde could tell you about. So it's no laughing matter to have a big block of liberals out there who are constantly tugging and pulling the Congress to the left.

Well, the second option is the Clinton plan, called managed competition. I think there is something revealing in that the temporary, or proposed title of the bill, is being prepared to embody the concepts of the Hillary Clinton task force. It's called the Health Security Act of 1993. Some of you will remember the Social Security Act of 1933 and see a parallel. And, indeed, it is true that some people believe that President Clinton sees that this issue could be for him what Social Security was for Franklin Roosevelt, and that it represents a good opportunity to make his mark in history. Thus, the Health Security Act.

Pollsters will also tell you that security is one of the dominant concerns of Americans, and, therefore, it's not a bad idea to include that phrase in the title of the bill. So that begins to tell you a little bit of the background of the Clinton plan.

It's been very difficult to get information about this plan because of the secretive nature in which it's been put together. But enough is known of the President's plan so that I'll be able to give you a little bit of detail. Most importantly are the implications for the members of state legislatures around our country. After all, state legislatures are going to be primarily responsible for enforcing this kind of plan, and I don't think you're going to like to have that particular responsibility.

It starts with a national board which has various responsibilities, most important of which initially, is the creation of a core benefits package. And that core benefits package, as it's been discussed in Washington right now, is extremely generous. It is estimated that it would cost between 100 billion and \$130 billion a year for Americans to obtain this core benefits package. That's the basic coverage that would include everything from eye glasses to dental care, to mental health. And a lot of other things which, frankly, a lot of Americans need, but a lot of Americans don't need, and yet would be part of this package. Everyone would be required to have insurance with this package from one of the accountable health plans. The accountable health plans, probably the best analogy would be to a giant HMO, although it doesn't technically have to be an HMO. But they would be giant health organizations that would contract with providers to provide the care called for in the core benefits package.

But you wouldn't buy the insurance directly from the accountable health plan. Rather, health alliances would be created, at least one per state, depending upon the size of the state. In large states there would probably be several. They would probably be appointed by the governors of the state, in any event a somewhat political decision. And they would be the regulators and the brokers for the insurance that would cover every American. They would regulate the industry. They would be the tax collectors from the employers who would largely fund the program. And they would actually buy the coverage from one of the accountable health plans in their area. So these health alliances would be very, very powerful. They would actually pay for the insurance through a combination of new taxes, including a new payroll tax which would perhaps be in the area of eight or nine percent. Now you'll hear this called by a lot of different names, but as we found in the debate over the budget, a contribution is a tax and an investment is spending. And this payment of premium on behalf of the employer and employee is a payroll tax.

In addition to that, those companies which would be administering their own health care plans...companies of over 5,000 employees which choose to do that... wouldn't be off the hook. They'd still have to pay a surcharge to help pay for everyone else. And then there will also be sin taxes on alcohol and tobacco and perhaps some other levies as well, but that's essentially how this would be paid for.

Now how is the cost containment going to come about? Well, initially, it is contemplated that there would be some kind of voluntary limitation on costs. Price controls, caps on fees, limitations on what insurers could charge, which would all be voluntary, but if you are straight from the reservation, it would actually be enforced.

On the longer term, it would be accomplished through what are called global budgets...a basic limitation on how much we would plan to spend for health care in this country. And I'm not talking about government health care. I'm talking about the health care that all of us would receive. Once the board established a national global budget, it would be allocated to each state, essentially according to population, and then each state would have to find a way to enforce the global budget. And that's where you, state legislators, come in.

It probably would start with the health alliance, and each health alliance would be given a percentage of the state's global budget. Let's say that in your state, there would be four health alliances, and that they're all about equal size, so that each one of them would get 25 percent of your state's global budget. It's now up to the health alliance to control the costs within the allocation given to that particular health alliance.

So the next level, of course, is the accountable health plan. The health plan would enforce this probably through some kind of utilization review, and essentially get to the point of rationing because its payments are going to be in the form of capitation payments, possibly adjusted for some kind of risk.

A state has a very significant incentive and disincentive to conform to the global budget. There are a lot of different things that could happen to a state. It is suggested in the draft that I've seen, that one of the disincentives for states which do not comply with its global budget would be to make the state 100 percent responsible for the cost of providing care to the low-income people in the state. In other words, if a state exceeds its mandate, all of the subsidized care would be the state's responsibility; no cost sharing with the federal government. On the other hand, if the state meets its global budget, then, in effect, it would get to pocket the difference. So you can see that states would have a powerful incentive to adopt regulations, and perhaps statutes, that would enable it to meet these limitations. I think that the net result of this is not hard to see. It is a form of rationing care in order to achieve these global budgets and that, to me, is a matter of great concern.

A third option is taking shape in the House of Representatives on the Republican side. It's called the Republican Leaders Task Force option, and it essentially plays off of the Action Now Bill, which was introduced last year. This is an incremental concept...it's not a fundamental reform. It essentially tries to keep the good and reform the bad, as I talked about before, but it does leave largely in place the functioning system that we have, with its emphasis on employer based coverage. It would allow small businesses to join together to purchase coverage for employees.

It would place limits on preexisting condition clauses and premium increases. It would preempt state mandates. It increases the tax deduction for the self-employed from 25 percent to 100 percent. It would permit tax deductible medical savings accounts. It would increase funding for community health centers. It provides asset protection for individuals in need of long-term care and, of course, includes tort reform, product liability and antitrust reform, and some administrative reform. As I said, this approach is more of an incremental, rather than fundamental change, but it is at least seen as a place holder, if not the most doable form of reform.

A fourth option is one which I'm just going to call the Chafee approach, named after Senator Chafee, a Republican senator from Rhode Island who has focused on managed care, but doesn't go as far as the Clinton managed care approach would. It, for example, probably would not have price controls or a mandate on employers, but in other respects, would be quite similar to the Clinton plan. So you see a dichotomy there between different Republican approaches.

The last two versions that I'd like to outline for you I'm going to describe as one, though they're actually somewhat different in their specifics. These are the consumer choice or market options, and they've taken hold primarily among Republicans in the Senate. They have been developed largely by outside groups, such as the Heritage Foundation and the National Center for Policy Analysis. And as I say, they both focus on the question of the market and consumer choice, and are based upon the current income tax structure, based upon the theory that this structure creates perverse incentives for effective and efficient delivery of health care in our country.

The tax code, of course, provides a significant incentive for business to provide health care for all employees, and it also does not tax the employee for the benefit thus provided. But there is not a concomitant benefit for individuals who secure their own health care based upon their own perceived needs. And there is a significant disadvantage for the self-employed—someone who does not obtain insurance through a large employer. The net result is unfairness and a disconnect between the choices that may be best for a family, and what is actually provided. And also a disconnect between what might be an efficient delivery of care and what is available, because it has been provided by the employer.

So both of these approaches build off of that problem with the existing system and, naturally, would address it by changing the tax code. Essentially, they both would provide a different kind of exclusion, credit or deduction for the provision of health care. And both of them would provide a credit for individuals, for families, instead of employers. Tax credits could be spent, or a tax credit would be provided, for money to be spent on either the acquisition of insurance or on payment into medical savings accounts, or on out-of-pocket expenses. And it could pertain to either the acquisition of insurance of only a catastrophic, high deductible kind, or a lower deductible, more standard kind of insurance. So whatever is best for your own family you would be encouraged to acquire, and the tax benefits of that would accrue directly to you and to your family.

Now the plans differ somewhat with respect to the specific amount of credit or exclusion. In the Heritage plan, the tax credit would vary, depending upon the amount of health expenses relative to income, so that you would effectively provide a greater credit if you have higher medical expenses, or a greater credit relative to income if your income is lower. This way it is believed that there would not be a difficulty for low-income people with high medical bills to be able to afford them. In both of these

plans, there is a concept of an earned income tax credit, or refundable credit, which would also assist the lower income families in the country.

Under the NCPA plan, there is a fixed credit, rather than a sliding scale. And depending upon the cost, that credit might be set as high as 90 percent of the costs of either acquiring insurance or a Medisave type of account. Under this plan, out-of-pocket expenses could be paid from the medical savings account. The total credit would be in the neighborhood of \$2,250.00 for an individual or \$5,000.00 for a family, 90 percent of that amount. Also under this plan, it could be transferable to the employer so that you still could have employer provided insurance.

The concept behind both of these plans is to provide the widest possible choice, and the incentives for individuals to acquire the coverage that is most suitable for them, and to use only that which is necessary. In effect, this permits them to pocket the difference. This would provide a more efficient delivery system for health care services, thus reducing the overall costs.

Now in at least one of these plans, the new credit...one that does reduce the revenues to the Treasury...would be paid for by gradually eliminating the current tax exclusion for employer sponsored health benefits, as well as other deductions. In both plans, the heads of households would be required to purchase some kind of coverage, in one case a minimum catastrophic kind of coverage. The idea is to protect society from having to take care of those who are improvident with respect to caring for themselves, by at least requiring minimum coverage for catastrophic illnesses.

Reform in the health insurance market, which is the fundamental concept here, would also guarantee portability. Because insurance would now be owned by individuals and families, rather than the employer, one could take it wherever one wants. And, therefore, since you have portability, you are less concerned with the issue of having to remain with one employer to keep your health insurance.

These plans also call for renewability, eliminating experience rating, and other reforms that would make it possible for all Americans, regardless of their medical condition, to acquire coverage. And they both include tort reform, antitrust reform, administrative reform, as the other Republican plan does.

So the concept here is to empower all Americans with the resources to have the same choices in purchasing health care coverage and, at the same time, create an incentive for all Americans to be wise health care consumers.

Now those are the essential choices that have been presented to the bill drafters for work over the summer recess. After Labor Day and I think you'll see iterations of all of these plans introduced.

The point that I would like to make in summing all of this up is that it is not by any means a foregone conclusion that the Clinton managed health care plan is going to be the bill that passes the Congress, and that we're going to have to live or suffer under in days to come. You all can play a very important role in forming public opinion, and in informing the debate, as these issues are aired out. And just as we did with the debate over the budget, we have an obligation to be as specific, as detailed, and as informative to our constituents as we can possibly be. It is in their best interests.

And I think we need to ask these questions. First, does it preserve the good and try to reform the bad? Does it preserve choice, maintain quality and reduce costs? Who does it put at the center of health care decision making? Is it the government, a new bureaucracy, the employer, or is it the individual or the family?

I think because of your experience in dealing with a lot of the issues that are associated with health care reform, you know these issues well and therefore can play a critical role. You've worked on tort

reform, on Medicaid reform, on state mandates, and a lot of other issues that are embodied in some of these concepts. And you're going to have to come up with innovative ways to deal with whatever the federal legislation is. In fact, a lot of the legislators in Washington are looking to various states for some guidance, not always, in my view, the best kind of guidance. Hawaii, for example, has a plan that has achieved credibility among certain members of the Congress. California has had tort reform for a long time. I know the Arizona recently enacted some tort reform. So there are a lot of ideas that have germinated from the states that could become a part of this, or at least could help to inform the debate.

And, finally, you all need to ask the critical and defining questions of your representatives in Congress because, as I said, we represent the same constituents. And it is in their best interests, in these life and death decisions, that we inform this debate and conduct it in a robust fashion.

I've got to conclude with a story. Whenever I think of some Clinton Administration appointee interpreting what the people of this country are saying, especially in these kinds of life and death matters, I think of a story that occurred in the history of Arizona, back at about the turn of the century. We had a group of law enforcers called the Arizona Rangers that were patterned after the Texas Rangers. And on this particular occasion the bank in Wilcox, which is a little town in southeastern Arizona, was robbed and all the gold was taken, and the Arizona Rangers were called in to track the perpetrator down.

And so they went after the individual with gusto and followed his tracks all the way down to Mexico. When they caught up with this fellow, there were two problems. Number one, he didn't have the gold and, number two, he didn't speak any English. Since these rangers didn't speak any Spanish, they had to engage an interpreter. And for a little bribe, or what's called *mordida*, they were able to pay a fellow in the local town to come out to where they were encamped and do the translating.

So the captain of the guards got this fellow over to the interpreter, and said, "I want you to ask Pancho here where he hid the gold." So the fellow turns to Pancho and, in Spanish, he says, "Pancho, where did you hide the gold?" Pancho says, "No se." He says, "I don't know anything about any gold." "What did he say?" "He says he doesn't know anything about any gold." The ranger said, "Look, you know, we're hot and tired and dusty and thirsty and we've been riding all day, and we know he's got it and we want you to find out. Ask him where it is. He's got to tell us where it is." So he says, "Pancho, they've been at this all day. They're hot and tired and dusty and thirsty. They want to know where you hid the gold." Pancho says, "I don't know anything about any gold." "What did he say?" "He says he still doesn't know anything about any gold."

So the captain of the rangers put a big rope with a big noose in it up over a tree, pointed to it and said, "Now you tell Pancho if he doesn't tell us where he hid the gold, we're going to hang him. He's going to die." So the interpreter turns to Pancho and says, "Pancho, they're serious. If you don't tell them where the gold is, they're going to string you up, you're going to die." Pancho looks at the rope and says, "Well, okay," he says, "You know that long adobe wall?" "Si." "And at the end of that long adobe wall, there is a hacienda. Behind the hacienda, there is a well, and the gold is at the bottom of the well." "What did he say?" asked the ranger. "Pancho says he's prepared to die."

Now doesn't that fellow remind you of Bill Clinton telling us that the American people are prepared to sacrifice? Anyway, you may want to join those of us who will be presenting an alternative to the Clinton plan. I can assure you that I will be one of the sponsors of the market based approach that I discussed today.

I hope you'll join us in that effort, and I wish you all the very best as you work in your respective states for all of the citizens of this great nation. ■

20TH ANNUAL MEETING
AUGUST 1993
TRAVERSE CITY, MICHIGAN



THE HONORABLE EDWIN MEESE III
FORMER U.S. ATTORNEY GENERAL

Former Attorney General Edwin Meese III recounts the course of crime and the philosophy that prevailed in the late 1960s and 1970s. The problem with our crime control strategies, stated Meese, is the attitude that incarceration is not an effective solution and therefore violent offenders do not get punished for their crimes. As average time served went down, crime went up, Meese pointed out. Meese went over two trends that occurred between 1980 and 1990: first, that violent crimes went up compared to property crimes, and secondly, drug use amongst criminals became an increasing problem. Meese gave various recommendations to reform the criminal justice system, focusing on keeping repeat violent offenders off the street as the first priority.

Thank you very much ladies and gentlemen. It's a great privilege to be with you, and believe me, I am happy to be here with you today.

As Representative (Jerry Lee) Alwin (N.M.) mentioned, the Heritage Foundation and ALEC are close partners, and I've certainly enjoyed the opportunity to work with your leaders. Certainly, Sam Brunelli and his staff are an outstanding group, as you know from your own personal experiences, and I was always interested in the active role in leadership of Bill Raggio. I've known Bill for longer than he'd probably want to admit...from the days when he was a District Attorney in Nevada and I was in the District Attorney's office in Alameda County in California. We worked very closely together at that time. So it's a pleasure to be here, especially since I will have the opportunity to discuss with you the issue of violent crime in America. There is no more important challenge facing our nation today.

One of the things that I think we have to recognize is the fact that crime has been, for many years now, the top thing that people worry about when they're asked, "What is the greatest domestic problem?" Periodically it gets eclipsed by the economy when we have high unemployment or when we have economic difficulties, but year in and year out, it's always in the top three or four topics that concern people.

And when we try to get the economy going, or when we try to work on the problems of the inner cities, or try to improve education, inevitably at least one of the trails of solutions leads to doing something about crime. You know from your own experience what's happened, and so I'd like to share a little bit with you from my own experience.

But first, I think it's important to recognize what's happened since World War II in terms of crime. In the 1950s, and from the period just after the war through the fifties, there was a philosophy in our country among almost all criminologists that incarceration was a bad thing. And so almost every idea other than prison was used to take care of convicted criminals.

And so by the sixties, we found in California, when Ronald Reagan became Governor in 1967, that less than ten percent of all felons, the most serious criminals, were going to prison.

Well, over the course of the late sixties and the seventies, he was able to change that by appointing judges in California who had a different view. But throughout the country this was the prevailing sentiment.

And that's why we had during that period, from 1960 roughly, to 1980, we had the largest increase in crime in the history of the country...a 300 percent increase in crime. As the average time served went down dramatically, crime went up.

Most people would say that kind of makes sense. Criminals can count, too. It was interesting that an organization in Texas the National Center for Policy Analysis, did an economist's computation of the cost of crime. They acted on the proposition that crimes are intentional acts and that they're freely committed by people who calculate the cost to them for committing crimes. And that in many cases the criminals, while they may not do it in a mathematical way like economists, nevertheless have a general feeling of what their chances are of getting caught. And if they do get caught, what's going to happen to them.

And so they did some calculations. They multiplied of percentage of criminals that got caught for each offense times the likelihood of conviction, times the amount of months that they would serve, and they came to a very interesting statistic. And that was that the expected time in prison for each murder is something like 2.3 years. For rape, it's 80.5 days. For robbery, it's 27 days. For aggravated assault, just a little over 13 days, and for burglary it's 5.4 days.

Now, obviously those that are caught serve much more time than that. But that's taking the average time that people serve, and then multiplying that by a factor of what their chances are of being caught. Now as I say, I don't think that criminals figure those things out exactly, but they do have a pretty general idea. And for that reason, many of them feel that crime does pay.

The important thing is, as was mentioned earlier in the opening remarks, today we have a situation where criminals are spending actually very little time in prison. We have a revolving door situation where the same people are coming back to prison, spending a little time, then going out to commit more crimes. And then most of them are coming back to prison at one time or another.

It seems to me that there's several things that we need to do, and while I could go into the analysis even more, I think it's perhaps important that we talk about what are the changes that have to be made. Let me just say this, however. We did have a period of time during the last 30 years when crime began to go down, and that was at the beginning of the 1980s. By that time, citizens had had enough of the old lenient philosophy and by the last half of the 1970s, into the early eighties, judges were sentencing more people to prison for serious crimes, particularly violent felonies, and they were sentencing them for longer periods of time. And so from about 1981 through 1985, crime actually went down in the United States...the first time that had happened, since World War II.

But what happened by 1985 was that the prisons were full, overcrowded, and so it was at that point, if you look at the statistics, that people started being let out much earlier and not completing their full sentence.

Indeed, today the facts are that the average sentence for a felony in the United States is four years, but the average time served is about 13 months. And that's just the average for all felonies. That's everything from car theft on one end up to murder on the other end. But the amount of time that people are actually serving is only about a quarter of that, and most of that is because of a lack of prison capacity.

The other thing that I think we have to recognize is that even though in 1990 the crime rate in the United States was lower than it was in 1980, there were two significant differences in 1990 over 1980.

One was the tremendous amount of violence, and while property crimes in general were down or plateauing, violent crimes were considerably greater. Secondly that drugs, particularly crack, was an

increasing problem in the inner city. The drug problem is kind of interesting. Up until 1981 or '82, most of the emphasis, what emphasis there was, on a national scale, was on law enforcement. In 1982, there was a comprehensive national strategy which included prevention, education, treatment and rehabilitation, along with strong law enforcement and strong international action.

And from 1982, that period when this strategy was implemented, up until the present time, we had a 50 percent decrease in drug use in the United States. Most of the decrease in drug use was due to the preventive activities in schools and drug-free workplace programs in business and industry. And so we have approximately half as many people today using drugs as we did at the beginning of the 1980s.

The drug problem, however, is starting to turn up again, particularly in high school and junior high school aged students. The reason is because we have this problem in the United States that when something's no longer getting a lot of attention, people start to forget about it. And so the preventive efforts in schools and businesses are perhaps not as diligent as they have been in the past. We have to be very wary that we don't get another major drug problem in our schools.

However, the thing that has happened is that among those people who commit most of the crimes in the inner cities, both small crimes and major crimes, drug use has actually intensified. Because with half the market lessened, drugs have been relatively available in the inner cities. The price has been cheap because you don't have the demand that you had before. In addition to that, you have had crack introduced, which in my opinion was a cynical economic marketing act by the drug purveyors, who could no longer sell hundred dollar lines of cocaine to relatively affluent people. So now they manufacture cocaine in crystalline form, so they could sell \$5, \$10 and \$20 rocks of cocaine to less affluent people in their communities.

So we have these things facing us today—a continuing problem with crack, an increase of drug use in the inner city, a revolving door situation as far as prisons are concerned, and a tremendous increase in violence.

There were two interesting comments that I noted yesterday in the paper. One was that there's been a 61 percent increase during the 1980s, .61 percent increase, in shootings committed by Americans 15 to 19 years of age. That's junior high and high school aged kids. For example, in our nation's capital, in Washington, D.C., the children and teenagers treated for knife and gunshot wounds in the last seven years has increased 1,740 percent. In some inner cities like Washington, D.C., New York, Los Angeles and other places, we literally have a war going on. What we have is a juvenile army out there, with the latest figures indicating that 270,000 children carry guns to school each day.

Now, 270,000 children—it's hard to put that into any kind of context, but for comparison that's half the projected size of the United States Army by the year 1995. The number of kids going to school carrying weapons today, is half the size of what the Army is going to be in 1995. What do we do about it?

The first thing is we've got to be realistic about sentencing. We have got to change sentencing and recognize that only if we're able to put people in prison for violent crimes, or for repetitive crimes, that we will start to get them off the street. Many people say that we're spending more for prisons than we do for education in our state. That may be true, but let me say this: Prisons are more effective in the job they're set up to do than the educational establishment is with the job it is charged with.

We know that while people are in prison, they're not committing crimes against citizens on the street and in their homes. And I can't say that education is equally effective in teaching people to read and write under some of the conditions in some states today.

Now, obviously we need to support both. I think one of the mistakes we often make is that people will say, well, we've got to do this instead of that, or we can't put money into prisons...because we have to give it to education. We need to do both. And I know probably all of you face these tremendous dilemmas at home in terms of trying to squeeze all the requirements into the revenues that are available. But I think it is important.

The other thing that we need to do is decide who belongs in prison, as was stated earlier by Representative Alvin. Earlier he mentioned that some people shouldn't be there. How do you know when a person belongs in prison?

Well, it's tough. It's not always possible to tell on their first time through. But you sure know when they've been to prison and gotten out and committed a new felony, and come back a second time and gotten out and committed a third felony. About the third or fourth time around, they have self-selected themselves as a candidate for a long time in prison. And I think when that happens, we ought to say this person is going to go to prison for, if not the rest of their life, at least until they get to that period where statistically we know they kind of burn out as far as crime is concerned. Maybe they can't jump the fences anymore, running ahead of the police or whatever it is, but we know statistically that by the time a person gets to about 50 years of age, they're not as likely to commit crimes anymore. I hope it isn't true that in prison they learn to read and write, so that the robber becomes a forger when he gets out about that age. But in any event we do know that if a person after the third or fourth time around is kept in prison, we know that that individual who has the capability of committing anywhere from two dozen to 150 crimes per year is going to be out of reach where he or she can no longer prey on society.

The second thing we've got to do is we've got to have society keep its promises. We have to keep our promises to the citizens of our country and also to the criminals.

One of the things we do when a person is put on probation is that the judge very sternly lectures him or her and says, "I'm putting you on three years' probation. I'm suspending two years in prison. Now if you get caught committing a crime or violating your probation during this three-year period, you're going to go to prison." Well, actually the judge knows, and the criminal knows, that that's probably not true. When that individual does commit a new crime, a new robbery, a new burglary, they're going to come back maybe in front of the same judge, or in front of another judge who sees the record, and what that judge is going to do. If he sentences him to prison the second time at all, he's going to make it concurrent with the sentence that was suspended for the first crime. In effect, the person on probation gets a free crime.

We have got to start living up to our promises, and when an individual violates their probation, they go to jail or prison for the length of the term of the first crime, and on top of that serve whatever the sentence is for the second crime, so that we don't give away crimes as a condition of probation.

Thirdly, we have to recognize that what I've been talking about—being realistic in keeping promises—has serious implications for the criminal justice system, particularly corrections. And it's important that we look at the whole criminal justice system.

Yesterday President Clinton announced federal funding to support putting up to a hundred thousand new police officers on the street. I think perhaps there's a good deal that can be done along that line. Actually, the money he talked about will barely support 60,000 officers on the street, but at least it's a start, and it's going to take time to work through this. And there were a lot of other proposals, too many of them which are good.

But the thing that was forgotten is you can't just look at that stage of the criminal justice system. We have today, in cities and counties on the streets of our nation, just under 500,000 police officers. Now if we add, let's say, somewhere between 60 and a hundred thousand new officers, we're making a dramatic increase in the number of officers on the street. Particularly if these are added to the street patrol forces, because a good third, at least, of those other officers are working on specialized details or administrative duties. Now, unless we have the courts, the judges, and ultimately the correctional facilities, to accommodate the arrests made by those officers, they really will not be adding to our ability to stop crime and to be a credible deterrent to the criminal.

In a bill that was introduced last week, by Senator Dole and several other members of the Senate, is a provision that does recognize the flow-through of the criminal when you add new police officers. This bill not only provides for new police officers, but also provides for matching grants to states for prison construction, as well as the building of some regional prisons which can be used for both federal and state prisoners. Now I think this is a much more realistic approach to solving these problems, because the bill that looks at the whole system. We also have to recognize that we have to look at more cost effective ways to build additional prisons as they are necessary, so that we can accommodate people for longer periods of time. I don't think we have to go on building prisons forever. You know, there's some people in the ACLU and elsewhere who say if you keep building prisons at the rate that we did during the 1980s by the year 2050 every other person in the United States will be in prison. Well, let's be realistic. I don't think any of us believes that's true. I think there will be a point at which we don't have to build any more prisons because we'll have the people who need to be in prison there.

We have, at the present time, a little over 800,000 people out of a population of 252 million who are in prison. Of the three million people total, or less than one and a half percent of the population, who are under correctional custody, only a quarter of those people, about 26 percent, are actually in prison; the rest are on parole or on probation. So it seems to me that adding additional prison capacity for a short period of time, and making sure the people who belong there stay there, is going to be a very good investment in the long run. However, it will not be the horrendous continuation of the building boom of prisons during the eighties, which was in large part because no prisons were built between 1950 and the late 1970s, due to the move away from incarceration.

There are other things we need to do, and I'll just mention them very quickly. We need drug testing at all stages of the criminal justice process, for bail, for probation, while in prison, while in jail, while on parole, because we know that people commit four to six times as many crimes when they're using drugs compared to when they are not. We need to put the heat on the federal government to do more on the illegal alien problem. I know the states in the Southwest particularly are aware of that and that's a whole topic in itself. We need to take another look at how our prisons are managed, and whether they are being effectively managed and whether they are places that deter criminals. And this means perhaps looking at whether the discipline that is necessary for those people to comport their lives within the law is being exercised while they're in prison.

And finally, I think citizens need to be educated to the fact that today we're only spending three percent of our total tax dollars on the justice system, including the police, courts, prisons, and the civil justice system as well. If people agree with us that protecting the public from those who would prey on them is a vital part of defense, then just as we've been willing to make sacrifices for our external defense, we need to make a serious investment in our defense at home. At a time when we are able to reduce spending on the military because we've been successful at fighting and winning the cold war, shouldn't we consider using part, or all of these savings, for fighting crime at home? Just going from three percent to four percent of our total tax dollars would give us tremendous resources to build prisons, add police officers and enough courts and judges so that, once again, society would be able to tell the criminal that when you commit an offense against our people, you're going to pay the cost. And the cost will be considerably greater than it is at the present time. ■



WILLIAM P. BARR
FORMER U.S. ATTORNEY GENERAL

As the Attorney General of the U.S. under President Bush, Bill Barr acquired an almost unique perspective of law enforcement and the criminal justice system. Barr suggests that the federal justice system be used as a model for reform in the states. Barr refutes many of the popular arguments against toughening prison sentences and aggressively targeting repeat offenders. Barr also states his belief that excessive gun control is a diversion from real crime prevention. Barr makes the case that the lenient policies toward punishing violent offenders that we have followed over the past thirty years are the cause of the "revolving door" system we now see today.

Thank you very much. It's a distinct honor for me to be here with ALEC today and also to share the podium with my new governor in Virginia, George Allen, who's shown what real leadership and courage can do. Now, I want to talk to you today about crime. The public is increasingly concerned about crime, and it should come as no surprise that polls are now showing it even surpassing unemployment as an issue. And George Allen's victory shows the political potency of this issue and that the people's concern is fully justified.

As we all know, violent crime in our society is at intolerable levels. Most of the increases occurred in the '60s and '70s during the era of permissiveness. After Ronald Reagan exercised some leadership and tried to bring strength back to the law enforcement system we did see a suppression of the crime rate in the 1980s, but it's been going up again. I think it's driven, at least it started in '86-87, largely due to the crack epidemic. But as we all know, a big part of it today is the juvenilization of crime, with more and more young people getting into a life violent crime. And what's the ultimate root cause of that? Well, a lot of the policies we followed in the '60s and '70s are now coming home to roost, policies that have broken up families, policies that encouraged illegitimacy, policies that gave public schools and other public agencies a moral lobotomy so that you couldn't instill values or exercise moral authority through schools or through public agencies. These are the chickens that are now coming home to roost. This is why we're seeing juvenile crime and gangs.

But another reason why I think we're seeing violent crime increase, spread and become more wanton and vicious is because we are relapsing to the revolving door system of justice that we saw in the '60s and '70s. The state systems are simply being overwhelmed by the volume of crime. Now, can any thing be done about it? What can we do about it?

There are still those in our society, and this is one of the big cleavages in our society today and in this crime debate, who say we have to deal primarily with the root causes. And you and I have heard this all the time — we shouldn't be spending more money on law enforcement, it doesn't do any good to put people in prison and so forth. We should build more schools, we should spend more on education, we should spend more on health care, attack the root causes of crime. I think these people are sadly mistaken.

First of all, we've been following a "root causes" strategy in this country for thirty years. That's what we've been doing. We've been pouring ever-increasing amounts of our resources into addressing

these problems, in the form of anti-poverty programs and means-tested programs. We now spend over \$290 billion a year, and that's just on the means-tested program. That's \$3,000.00 a year for every taxpayer. And the notion that if we just spend a few billion dollars more here or there on more education or health care, or housing, that somehow we're going to have a breakthrough, I think, is fanciful.

But, more importantly, even if we knew how to deal with root causes, even if we knew what kinds of social programs would help, this is a long-term solution. This is a fifteen or twenty-year solution. It won't bear fruit before then, and people deserve protection today. I was at a conference just last week at Notre Dame and, again, there were the people up on the podium saying, "Oh, getting tough on crime, just putting people in prison, putting offenders in prison, doesn't work. We have to deal with the root causes."

When I was Attorney General every place I went there were people crying out for law enforcement. I remember we went on a raid in Fort Worth, Texas, to a housing project that had been terrorized for weeks by a gang. And this woman, a 70-year-old woman, came downstairs and she kissed my hand and she was saying, "Please don't let the police leave, please don't let the police leave." She'd lived on the floor, lying on the floor, for two days because of gunshots around the complex. What can law enforcement say to her? "Well, we're going to spend more money on education and housing and in twenty years this will be a safer neighborhood?" No, she deserves protection today.

Finally, violence has reached a level in our society where I think it's strangling any of our efforts to rehabilitate or restore society, to rehabilitate neighborhoods, to provide opportunity. What good is it to build public housing if it's going to be used as slash housing? And what good is it to build a model school and spend so much more on education if the school is going to be run by gangs? The foundation of economic growth and of opportunity has to be peace and security.

While I think there are many things we can do on many different fronts to address the problem of violence, there's absolutely one indispensable thing, one sine qua non that we have to devote our attention to, and that's to restore our criminal justice system and once again make it effective at punishing, deterring and incapacitating violent offenders. Our strategy has to be centered on one fundamental truth, which is that most of the predatory violence we see in society is committed by a relatively small group of repeat violent offenders, and everybody in this country knows it. I don't have to go into many statistics to prove that point. When people pick up the newspaper and they see the current "horror of the day" almost invariably that violence has been perpetrated by somebody with a long criminal history. Polly Klaas' case is not the exception, it's the rule. The tourist in Miami is not the exception, it's the rule. The murderer of Michael Jordan's father is not the exception, it's the rule. Every year 6,500 Americans lose their lives, are murdered, are gunned down, by people who are on bail, probation, or parole at the time of the murder.

The key problem we face is the revolving door. The fact is we're not incapacitating these offenders long enough. Polly Klaas would be alive today if her abductor had served out an appropriate prison sentence — an abductor with a twelve-page rap sheet. So the single most effective step we can take is to slow this revolving door. And the foundation of all our other efforts has to be to target and incapacitate these repeat offenders. And I think this requires three things. It requires reform on the state level. You all know the game that's played in Washington, D.C., with crime bills and all the cynicism that goes into it. There's very little that can be done on the federal level, substantively, to deal with violent crime. It has to be done at the state level, state-by-state, and it's going to require first and foremost changing the system — truth in sentencing, pretrial detention for people with violent criminal histories, reforming the juvenile justice system. These reforms can be done and George Allen is a good example of how it can be done with leadership, because the people are hungry for it.

I remember this Dallas police woman. She joined the police force at 40 years old and she's now a grandmother but she's still an active cop on the beat in Dallas. And she came up to me at the end of a speech when I was still Attorney General and she said, "Oh, please keep on doing these programs, especially your Trigger-Lock program," Which is a program where we can throw these people in prison for a long time. She said, "We caught this guy, he had 13 illegal weapons in his trunk, he had more than three prior felonies, we were going to throw the book at him and put him away for 25 or 30 years. He broke down and cried. He cried. And because of his cooperation we've solved thirteen murders and put three drug organizations out of business." Well, there's only one criminal justice system that makes criminals break down and cry in this country, and that's the federal justice system. And what we need are 51 criminal justice systems that make criminals cry in this country. Then we'll have an impact on violent crime.

The second thing we need to do is to devote appropriate resources to law enforcement. Yes, more police. Yes, more prosecutors. Yes, more drug treatment. But also more prison space where necessary, to keep those violent offenders off the street. Newt Gingrich and I have been talking about an idea which deserves some study, and I think he's written an op-ed piece on it. And that idea is, as long as the crime rates are as high as they are today we have to get back to priorities. Remember, the first duty of government is to protect its citizens. We should relieve states of substantial portions of these federal mandates, whether they're funded or unfunded, and allow states to shift resources to dealing with violent crime before any of these mandates kick in.

The third thing we have to do is aggressively target offenders. We have the Trigger Lock program I mentioned, where we took these violent offenders off the street: three prior convictions, possession of a firearm, you went away fifteen years to life without parole. And in the eighteen months I served as Attorney General we had 12,000 people off the streets — one thousand a month by the time I left. The average sentence was nine years without parole. The average sentence for three prior felonies, 15 years without parole. That's a waiting period that actually has an impact.

Of course, there are the critics, and we all know their arguments, who say, "Oh, it's too punitive. We already have more people in prison than South Africa and the old Soviet Union, we're too punitive." No, we're not too punitive. The chances of going to prison in the United States are the same as in Canada, the same as in the United Kingdom and all these other liberal democracies. What's different in the United States is not the risk of going to prison if you commit a crime, it's that we have a lot more violent criminals running around the streets. I say we're not punitive enough in this country. In fact, the prospect of punishment today if you commit a crime, the amount of sentence and time served you can look forward to if you commit a crime, is 25 percent of what it was in 1950. Well, if we were too punitive in 1950, I'm all for it. Let's get back to 1950.

And there are those who say, "Well, it hasn't worked. We've put all these people in prison and it hasn't worked." And it's true, we've put 500,000 people in prison since 1980. We've increased the capacity from about 300,000 to 800,000, not counting jail. And they claim it hasn't worked. My argument is similar to what G. K. Chesterton said about Christians and Christianity. He said, "Christianity hasn't been tried and found wanting, it just has never been tried." And I think we have not followed the tough policies we have to follow as the revolving door statistics demonstrate. We started to, in 1980, and we've gotten tougher and it's borne fruit. We have seen a suppression of the crime rate, but can anyone seriously argue that we would have safer streets if we released the 500,000 criminals that we have put in prison since 1980? I had a standing offer when I was Attorney General — I'll release any twelve violent criminals in federal prison as long as they live in your household. I had no takers.

Now, there are those who say we can't afford it. The only time I hear liberals say they can't afford government was when it comes to the very first function of government, which is public safety. Anything else, they can afford, no matter how harebrained an idea it is.

We spend tens of billions of dollars a year on environmental programs. I saw a headline, we should spend \$30 billion more in this country scrubbing the air just a little bit more clean to get rid of this thing, because there's a one-in-something-or-other chance that someone's going to develop corns on their feet if we don't do it. On average in our environmental programs, and our safety programs, and our worker safety programs, and our highway transportation safety programs, we spend \$2.6 million to avoid the risk of one premature death. And in some programs, like asbestos removal from school, we're spending over \$10 billion for each death prevented. Well, the real carnage is in our streets. And what has changed the complexion of our life more than anything else is violent crime. If we used that \$2.6 million a year to prevent a premature death or serious injury — if we used the same kind of cost/benefit ratio — we'd be spending five or six times more on law enforcement than we are in this country. So I don't like to hear this notion that we cannot afford it. It's a matter of priorities.

One last point. There are those in our society who are congenitally unable to bring themselves to take a violent offender and remove him from society for any effective period of time. They just can't bring themselves to do that. And so they look around for other kinds of panaceas to deal with crime. They will look for anything except just taking the violent criminal out of society. And one of the principal panaceas they look to is this excessive focus on gun control as the answer to violent crime.

Now, I think that's a dead end. It's a diversion. It's a side show, and one of the principal dangers we face right now is allowing the real efforts to deal with violence to be hijacked and sent down this road of gun control. Are there some reasonable measures that can be taken, such as preventing minors from getting guns? Sure, there are some reasonable ones. But we know there's a broader agenda to deal with guns instead of dealing with criminals. There are hundreds of firearms already in circulation for each one chronic violent offender. And if you give me the choice which to take off the street, chase after two or three hundred guns or take one violent offender, I'll tell you which one saves lives. The New York Chief of Police boasted to me the other day, "I took 8,000 guns off the street in New York last year." My reaction? "How about taking 8,000 violent offenders off the street?"

They remind me of yuppie parents who have a little terrorist child who's running around the household, kicking people, knocking over china and pulling people's hair, and the Yuppie parents sort of walk out in front, removing things out of the way of the little terrorist instead of dealing with him.

But the biggest hypocrisy of all is that these people, the greatest, the loudest proponents of gun control, are not willing to enforce the laws that we already have on the books on gun control. This administration is killing the Trigger Lock program. It will not put these three-time offenders away, and they should be put away. It will not prosecute existing violent offenders who use guns and throw the book at them. It's not automatically adding the five-year enhanced penalty with no parole for someone who uses a firearm. So don't come whining about gun control unless you're willing to enforce existing laws against the real violent offenders who use guns.

The problem of violent crime has taken thirty years to get here. It's not going to go away overnight. It's going to take a lot of hard work. But I think we have to reject those who throw up their hands and say, "There's nothing we can do." And we have to reject the people who say that tough law enforcement policies won't work. I think there is something we can do — it takes will, it takes constancy of purpose, it takes a little bit of leadership to get the ball rolling, and it will take a fight ultimately neighborhood-by-neighborhood. But first we have to start by winning the fight state-by-state. Thank you very much. ■



THE HONORABLE DICK ARMEY U.S. HOUSE OF REPRESENTATIVES

The complex issue of health care reform and the numerous bills proposed by members of Congress are candidly discussed by Representative Dick Armev (R-Texas). With his colorful style, Armev boils down the issues in the health care debate, and the political dynamics that are driving the issue. Armev states that health care reform has more to do with political ideology than with concern for having a healthy population. Armev describes the seven major health care proposals that were being de-

bated on Capitol Hill at the time of his remarks and each proposal's chance of enactment. He offers his opinion on the job the President and First Lady had done to that point on reforming health care, and the potential problems he thought they may face in passing their plan.

I was born in a little old town called Cando, North Dakota, and we have some terribly, terribly harsh winters. I had the privilege of living with Marion L. Armev who I call the queen of irreverence. My mama has passed on now, and she's up in heaven. But there's a little part of her that perches on my shoulder, and every now and then she whispers words that are just exactly the right characterization of some pomposity going on around me. And ordinarily, I just sort of say, thank you, mama. But there was a time recently when Mrs. Clinton got a few comments on me, and I managed to recover and get back, to defend not only myself, but Dr. Kevorkian. And if you think I was offended by the characterization, Kevorkian was absolutely livid. In that case I wasn't sure it turned out so well, whether I should thank my mama, or whether that may have been, in fact, a ghost of Christmas past that got me through that day. But, I have fun doing this job and I hope I do it well, and I hope it does some good.

But I would like to talk just in terms of what I think to be the political-legislative dynamics that will occupy the health care debate and subsequent legislative efforts. I got myself in a little bit of trouble the other morning with a group similar to your own, except in that room that morning, had I been a little more sensitive, I would have been aware that the room was tilting a little to the left. I missed that. I get the impression this room is tilting a wee tad to the right, and I might be a little more comfortable. But please understand, I am trying to explain to you what I perceive going on, and that doesn't necessarily say I condone it, nor that it is what I prefer to see going on. But I am going to give you my most objective evaluation of what is happening in health care.

The biggest problem in health care today is the one people don't dare to say. The problem is that the purveyors of gloom and despair have framed the debate. But Armev's admonition is, never trust data that speaks of gloom and despair coming from people who are in the business of peddling more government. And we have allowed it to be framed where the general consensus of opinion, which people don't dare refute, is that, we have a health care crisis in America. And let me just say that, as Porgy and Bess said, "it ain't necessarily so." And whenever I am grammatically incorrect, I like to cite somebody else.

We have, I dare say, the best health care system in the world. We have the best personnel, we have the best science, we have the greatest innovation, we have the greatest access, we have the greatest facilities. And we ought to be proud of that. We have no health care crisis in America. There is no shortage of health care resources or resourcefulness.

Now, we have problems. Problems that are seriously troubling the American people. And in this sense of concern that the American people have, they have quite wrongly turned to the government for relief. It is a mistake we happen to make in this country, a mistake we're often goaded into making. But what we ought to do is just take a long, sobering look at what it is we have, how it is performing and where is it malfunctioning, and then, answer the question of why is it malfunctioning. We have not done these things. We have done the typical thing done by people in Washington, which is to take a singular statistical fact and make a federal case of it. Now the fact is, at any given period, any given point in time on any day, you can get up and find 37 million Americans without insurance. The problem is, if you get up tomorrow you'll still have 37 million Americans without insurance, but they will be a different 37 million. And nobody wants to take time and sit down and analyze who are these people, why are they uninsured and to what extent is it anybody's business but their own.

Because we have this endemic refusal to deal with facts in the business of making politics, I get myself in trouble with my colleagues. I remember the whole Agriculture committee was terribly upset with me when I pointed out that demagoguery beats data every time in making public policy, but the fact is, it is true. And when we take on a legislative project, the first thing we try to assess is what is the demagoguery potential. That's why we did base closings, we beat the demagogue out of it. That's why we didn't do what was frankly something that was needed more, which was procurement reform. Because all of the demagoguery was on the bad side of it.

I mean, let's be realistic about this process. Politics are made by mere mortals. And they have all the foibles of mere mortals and they have all the self-centeredness of mere mortals. My line is that Chicago is a city of big shoulders and Washington's a city of big egos. And we need to understand that these personality dynamics are an essential part of the process by which your laws are written. And if we don't take time to understand these things, we don't understand what's going on in our world, and usually we're paying the consequences for that lack of understanding.

So the fact of the matter is, the health care debate is not based very much on fact, and fact will get you very little distance in this debate. Ridicule and indictment, of course, are the instruments of political discourse. Facts and figures, of course, are not, especially in a town that is staffed by people that can't be trusted with neither words nor numbers. And my line is, if you accept words and numbers, you'll listen to anything they have to say. But the truth is people don't discover facts in this town, they create facts and, of course, that brings us back to the problem we're now having in the Congressional Budget Office.

My line up, incidentally, from left to right, of the different plans, is slightly different than how it was described earlier. And part of the problem is that it looks as if on your graph here that Chafee and Cooper are neutral. They are on the side of Morgan. Anyway, there are seven plans before us. The McDermott Plan, of course, which is the Bless America with a Canadian system in total disregard of the fact that the only thing that makes the Canadian system workable is Canada is not America. But Congressman McDermott is a romantic and a psychologist by training. He's got enough formal educational training to have had some semblance of brain damage. I wouldn't say he has brain damage, but he has had enough education to have it, and you know that's a dangerous environment for anybody today. I always thought of that one when I sent my five children off to college. It was a curious thing I was doing, actually paying money so my children could be put in harm's way for brain damage. Nevertheless, I don't want to criticize Congressman McDermott. He's a bright and able person, and a responsible, caring person but I think frankly he's somewhat misguided. In fact, I was telling a colleague of his the other day, that McDermott was so misguided, he thought I was misguided. But, at any rate, it's hard for me to imagine that anybody that has any experience with reality, watching the world as it works, could seriously propose a Canadian system in the United States. You would think the revolt of visiting Canadian doctors and patients would be enough of an uproar already.

Then, there is the Clinton plan, which we all understand is a comprehensive bureaucratic nightmare.

Some of you may have noticed that we did an organization chart of the Clinton plan. A couple of facts about that organization chart are that we had about 10 of us working on that, we worked for an extraordinarily long time, and we blew a CD ROM. That's a true story. We did, and we sat through discussions with Ira Magaziner. You may remember Ira Magaziner is the person who is responsible for the reconstructing of the Brown curriculum in the 60s, who made his magnificent contribution to higher education at that time, and has now decided to take care of deconstructing American health care. He has twice now had an opportunity to refute the accuracy of our chart, and in neither case has he responded to us directly, although he has said publicly that he has problems with the chart.

My favorite characterization of the Clinton plan, which shows up in that organization chart is that this is trickle down health care. It really is, and the last person who has any say in the matter is the health care consumer. And of course on that basis, the White House thinks they simplified health care. If you give the American consumers no choice whatsoever except to follow the mandate of the government, you have simplified this world, because he now does not have to think about what he's doing, he just does what he's told. That is their variation of health care simplification. And, on the same token, physicians and other health care suppliers are to do what they're told as well, because there has been too much evidence that health care that professionals have been thinking for themselves.

Now, let's face it, if you construct a system of law and regulation that allows politicians and bureaucrats to dictate to doctors and nurses, you're going to destroy health care. You will drive the professionals first crazy, then out. Just as you have seen in Canada.

Then you have the Chafee plan, which I characterize as decaffeinated Clinton. They're fair about it, though, they don't give the mandate to the employers, they give the mandate to the employees, and that's, of course, always politically risky. When you give the mandates and the benefits to the same people you give the bills, they generally don't like it. The trick in building comprehensive government is to give the benefits in one place, and then give the bill another place. Then, if somebody complains about the bill, they're just being selfish. But if they get the benefit and the bill, then it is possible they could be construed as tactful. And, of course, that is something we don't want to admit on the part of constituents. This is the problem we have when constituents start getting uppity and talking back.

Then you have the Cooper Democrat Leadership Conference initiative. You know President Clinton is a Democratic Leadership new democrat, that's what he told us all through last summer. We now discover that the new democrat is a counterfeit conservative looking for work.

You then have the Michel Lott plan conceived by a task force of House Republicans. Now you're getting into the direction of actually building down government and reforming government impediments to the malfeasance of the private sector, such as comprehensive tort law reform and the repeal of state mandates and antitrust laws. Did you know that the members of the National Federation of Independent Business are prevented by law, from voluntarily and freely organizing themselves into a health care alliance so that they can communally join their resources and bargain to buy health care? That would be a violation of the antitrust. That is to say, you cannot form these kind of coalitions unless the government does. Sort of like citrus fruits in California. If the government creates the oligarchy or the cartel, then it is accepted.

But at any rate, you're really getting on that side of removing government impediments to private sector efficiency when you get to Michel Lott. This plan is really the first place you get to downsizing government and building on the freedom and intelligence and integrity of real people in the real world.

Then you get to the Gramm proposal. And Phil Gramm, of course, has almost gone berserk. He thinks people can handle all their own affairs. And you know Phil Gramm also spends a lot of time talking to his mama, if you ever listen to him. I just think maybe people in public office should be required to go home and talk to their mama more often.

And then of, course, the latest entry is the Nickles/Stearns entry, built on the work of the Heritage Foundation.

Now, what do I think is going to happen? That's what I was really going to tell you. I don't think this whole great debate is about health care. I think this whole great debate is about political ideology, and the more I watch the process, the more I watch the heavy-handed, close-minded manner in which the White House and the leaders of the House and the Senate are proceeding in this, the more I believe that we're really talking about something quite different. Many times you find yourself in an argument with somebody and it seems such a little trifling thing, and then you realize we're really frightened about something different and bigger than the incident of a debate. And this is, I think, really beyond that.

The President gave birth to his health care task force in the halcyon days of partisan arrogance soon after the election. They came back to town with a Democrat in the White House, a Democrat majority in the Senate, a Democrat majority in the House, and they really had the attitude we're in charge now, we want all the marbles and we got all our hands, and all the leverage and we're going to do things our way. And they created this semi-secret 500 person health care task force and we don't know who's on it. We know that there were two Republicans appointed to it. We also know that neither were ever invited to a meeting. We don't know how much they've spent, and we don't know what they spent money on. Now, the courts are examining that. In the meantime, we have seen their work product and their work product is clearly ideologically defunct. And it is a frightening work product. I believe that if this plan is passed into law, that the government will create the health care crisis that today it alleges. And you and I will all suffer.

At any rate, I believe that the President has put health care into a partisan pact, and has used health care as the definition of the co-presidency between himself and Mrs. Clinton. The fact is they said, very clearly, in agreement with one another, that this was a co-presidency and that she was going to have her role to play. And health care is what I think defines that co-presidency. And she, not having to suffer the slings and arrows of the electoral process, I believe, is more ideologically defined than the President. This is her bailiwick, and that becomes a problem when the President wants to leave that plan and try to find something that will work. Because in the final analysis, he must get something that will pass the House with 218 votes and in the Senate with 51 votes. And his plan won't get there. McDermott's plan won't get there. Public opinion is pulling the Clinton plan down and as the Clinton plan falls, so falls Chafee. So that, as we look at realistic possibilities for something passing into law, it has to be something that will be constructed out of either the Cooper Grandy plan, the House Republican plan, or the Gramm or Nickles plan.

I was talking about political reality, knowing if you will, that I sponsored the Nickles plan, the Gramm plan, and the Michel Lott plan, and that I am intrigued most by Nickles' and Gramm's. I have to tell you where we get to if McDermott's and the President's fall off the left end of the universe, and Gramm's and Nickles' fall off the right end. As much as I would like to see one of those options pass, I don't think it is very likely that it will happen. So, the construction in the end has to come from either the Cooper-Grandy or the House Republican. Now, we would think that the President is going to break the bonding on his left over his plan or something to the left of it, which is going to be an excruciatingly painful thing that I think is going to happen very late. And if he doesn't break with this ideological definition by the end of April, he's too late. I fear that he will not. That is to say he will have his feet held in that fire for as long as May or June. And if gets that late, it's too late.

But he will finally realize, "I'm not going to pass this, I've got to do something." I think the most self-serving words the President has ever said on health care is that, doing something is better than doing nothing. He's talking about the chances for a Clinton reelection here. He's not talking about the American people. And so, doing the wrong thing in that case is equally acceptable as doing the right thing, because he lives in a world of political imagery, and they're relying on the characterization that he's trying, that he's doing something. He's taking on the tough issue. So when he breaks down to the

partisan gridlock that he created himself, and his party rushes to reinforce him on health care, he's got to either go to Cooper/Grandy or the Michel/Lott proposal.

Most people are predicting that he goes to the DLC, to Cooper and Grandy, to the Republicans, building a coalition like you saw in NAFTA, and like you saw in the earlier years of the Reagan years, with the boll weevils and the Republicans. I don't think he can get to a coalition which delivers 218 votes in the House and 51 in the Senate. I don't think he can go that way in the House through Cooper and Grandy. He can go that way in the Senate, I believe, but he can't get it that way in the House, and the reason being the animosity that the left has towards Cooper. It is amazing the assault that they have levied at him, because Cooper and the DLC represents the struggle for the President's soul within the Democratic party. They can't let the DLC win, because that is redefining their party in a direction that is not mainstream in their party. It is mainstream in America, but not in their party, and the liberal domination of the Democratic party today cannot let Cooper win on health care.

And this speaks to a very difficult thing. Grandy, in terms of the Republican influence in that team, is going to be spending all of next year preoccupied with running for governor of Iowa. And Grandy has his problems in his Conference for having, one, been on the health care task force that created Michel/Lott, and then, two, to immediately after submitting that work jumping over and trying to negotiate a separate deal. So, it makes it very difficult for them to draw a lot of votes.

And the other influence that the President runs up against is that Republicans may be perfectly willing to form a coalition with this President as reminiscent of NAFTA or the Republican Boll Weevil Coalition of earlier years. But we're not going to form that coalition and provide 72 or 75% of the votes in that coalition, and then let the Democrats or a Democrat or any Democrat walk off with 85% of the credit. That is to say, the Republican Party in Washington, D.C. is getting smarter all the time. And, we understand that too often when good things have happened, they have run off with the credit while we have done the heavy lifting. And we're just not going to let that happen. So it is my belief that the President will find himself once again stymied in his efforts to come through Cooper/Grandy. Furthermore, Cooper/Grandy has an incredible foundation to it. It's founded on the idea that a government can manage competition. And to most Republicans who would cast a vote in the House, that is inherently incredible. So, not only is there an intellectual flaw in their product, but in the political dynamics as well.

Now if the President wants to pass a health care measure this year, he has to start working with the Michel/Lott proposal and constructing around that. In my estimation, it is the only chance he has and, in terms of the internal conflict in his party, is a terribly tough proposition for him. My prognosis is that he has a minimal to zero chance of passing his own plan, and that he has less than a 50-50 chance of passing anything. But if he passes anything at all, it's going to look more like Michel Lott than anything else that you see on this spectrum of seven bills. That's my prognosis in the matter. We're going to see extraordinary dynamics, a mixture of policy, politics and personality that's going to be as equally intriguing as NAFTA.

If the President doesn't achieve that this year, then I have to tell you more than ever before I believe that we will have a Republican, or at least a conservative, that is Republican Boll Weevil, domination of Congress, when it comes back after the election. And that it will definitely go in that direction.

So we have a lot of things going on in this debate, and quite frankly they reach a lot further than any particular health care proposal. And I believe in the final analysis, conservatives win and liberals lose. Now, frankly, that is due to one fundamental fact. Conservatives are in touch with the people of this country, and liberals are not. The President emulates Reagan's strategy in trying to bypass Congress, and go to the people. It worked for Reagan because of the substance of Reagan. You can't take Senator Mitchell's substance to the people and have the strategy work. So, the President has to decide during the course of these next six months, whether he's going to be the leader of his party, or like Jimmy Carter, the victim of his party. And that's really where he's got to make this determination. He has

put himself in a partisan box around the issue that has the comprehensive interest of the American people, and that is going to make it very, very difficult for him to emerge as the leader of his party. It's a terrible position for a Democratic president to be in, and I hate it for him. Thank you for letting me be here. ■



JOHN FUND

EDITORIAL WRITER, *THE WALL STREET JOURNAL*

John Fund, who was awarded the Warren Brookes Award for Excellence in Journalism, addressed an "emerging consensus in America." From his perspective, a large majority of the American people want three main things from their government: accountability, improved quality and a reaffirmation of what he broadly describes as basic American values. Fund extrapolates on these three points and suggests that state legislators who take bold action to restore accountability, quality and values to the system will be the leaders of tomorrow. Fund states that the real political risk in these "pre-revolutionary" times is doing nothing to change a system that people are fed up with. Mr. Fund makes the point that many Americans feel disconnected from the political process and they must be inspired to get involved in the political process of government to renew this country.

Thank you. Thank you very much. I'm especially pleased to receive the Warren Brookes Award for Excellence in Journalism. Warren was one of the most inspirational figures in my early career. I probably learned more from him than from any other journalist. And I mean that sincerely. Warren, I think, lived up to H. L. Menckens motto, for what a journalist should do, which is to always comfort the afflicted, and afflict the comfortable. And Warren always reminded people that as a columnist, unlike a reporter, he got to choose who was comfortable and who was afflicted.

I have to take advantage of this opportunity to give you a few other words of either wisdom or trivia, depending on how you take it. I recognize, unlike a lot of journalists, the difficulties that you as state legislators have. You have to propose real solutions to problems, but you also have to be cognizant at every step of the way that there are political risks in angering special interest groups that are powerful, and could move to defeat you or frustrate your wishes. I'm here to tell you that I think we are at a very interesting juncture in American politics. One which only happens every two or three generations. A juncture in which the people are so fed up and frustrated that, at this point, good policy is now good politics. I've traveled around the country, I've examined a lot of polls, and I'm here to tell you that I think there is an emerging consensus in America. I think about 70% of the American people have coalesced around three core ideas. If you walk up to people on the street and ask them about these things, they won't articulate them quite the way that I will, but I think the vast majority of your constituents share these values.

The first is accountability. People are fed up with politicians who say one thing on the campaign trail, and do something else in office. If you don't believe me, ask George Bush what it's like to be an ex-President. And ask Jim Florio what's it going to be like to be an ex-governor of New Jersey. They want politicians to actually deliver on what they say. They want results. We are seeing this mood manifested in such movements as the initiative and referendum movement, which is increasingly taking power out of the hands of legislatures that are unresponsive, and taking it directly to the people. Consider the term limit movement, and the school choice movement. The school choice movement, by the way, has not been slowed down by the defeat in California. Be it Michigan, which passed charter school legislation last week, or be it the District of Columbia, which now has a superintendent of schools who announced last Wednesday that he was going to turn over the management of 15

schools in the District to a private firm. Be it Minneapolis, which has announced that a new private consulting firm will take over the management of every school in the city, with the president of that firm in effect becoming the new city school superintendent. School choice in all of its forms, is prospering.

I'm just back from Puerto Rico. They not only have a charter school amendment that is passed into law, they have a voucher system which is being implemented in one-third of their school districts. Now the charter schools and the voucher initiatives work together, not separately. The community schools set up by this charter school amendment have prospered magnificently by ridding themselves of the regulations that burdened the other schools. In this Puerto Rican experiment, more children are now transferring from private schools in Puerto Rico to these new charter schools than from the public schools to the private schools. I think this is empirical evidence that school choice does not mean the death knell of public education in this country. What it means is the re-invigoration of public education in this country through competition. Puerto Rico is only the first of many living examples that we're going to see state by state.

The second principle which I think has an emerging consensus behind it is that government is no longer a good buy. People increasingly are going to demand value for their money. If government were a consumer product, on the shelf of a store, it would be sued for false advertising, and it would be taken off those shelves for being defective. Voters today want to be treated at the state and local level as customers, not as constituents. What are the hallmarks of good customer service in the private sector? Quality, price, and after sales service. Government today is falling down on each of those three standards. Voters want performance, not more government investments. They want better, not more — they want value, not volume. And they will elect office holders that they are convinced will start to give them value for their money. In the 1980s, private business in this country went through a wrenching restructuring; downsizing, reorganizing, slimming down. It became lean and mean. We are more competitive now than we've been in decades, despite what you may read. The military in the 1980s went through the same restructuring and wrenching downsizing, but it came out a better service, as demonstrated by our magnificent performance in the Persian Gulf War. There is one major aspect of American life that has not gone through that restructuring, and that is the civilian public sector. It remains fat, bloated and out of control. We are developing a Twenty-first century private sector that is burdened with an eighteenth century governmental bureaucratic structure. The two cannot remain compatible for much longer. We must bring government up to the standards that the rest of society has come to expect.

The third principle focuses around the broad issue of values. When our founding fathers began this country, I think they made an interesting bargain with the American people — that in a free society, we are all responsible for our own actions. We are all responsible for living our lives and bringing out that which is the best within us. Obviously, if we get into trouble, we should look to family, we should look to friends, we should look to community, and only then to the lowest level of government. At the same time, we are a free and tolerant nation. As long as people practice self-responsibility, as long as they have to accept the consequences of their actions, we would allow a great deal of diversity and a great deal of eccentricity in this country. We would allow many people to live their lives as they saw fit, so long as they did not infringe on the rights of others. That bargain held in this country for roughly 180 years, but it has broken down since the 1960s. Increasingly, we have reversed that bargain. Rather than promoting personal responsibility and allowing tolerance and diversity at the same time, we have a growing number of people in this country who seem to think they should not be responsible for their own actions, that somebody else should pay or subsidize their decisions, no matter how wrong-headed or how foolish they are. And at the same time these very people who don't want to practice personal responsibility are demanding increasingly that everyone else in this country agree with them and are increasingly intolerant of other people. I point simply to the politically correctness movement and the anti-smoking campaign as two manifestations of this. Both of them have taken on the aspects of a religious phad almost, in secular form.

So, I think the American people continue to be interested in being tolerant of many values, but that is not the same thing as saying that some values aren't better than others. Some are. Just an example about the issue of two-parent families. Dan Quayle in 1992, when he dared to raise this issue, was laughed out of every media outlet in the country. Now Bill Clinton agrees with him. Eighty-three percent of the American people agree with him. There's an emerging consensus that two-parent families are better than the alternatives, despite the fact that those alternatives will exist, and we certainly should encourage those people who are in different circumstances.

Now, having listed these three values, I will make the statement that the political leaders who address these concerns are going to be the ones entrusted with power in the next decade, and the ones who will be honored as political heroes in the decade after that. We live in pre-revolutionary times. I believe there is a pent-up demand for reform and change in this country which has only begun to be met. I see it everywhere. I live in Jersey City, New Jersey, a city that has been dominated by a corrupt machine for 70 years. But the city that comes first to the edge of the abyss is the city that steps back from the abyss the fastest. Bret Shundler, a 34-year old Wall Street lawyer who has lived in Jersey City for only five years, ran for Mayor. He got elected in a splintered election with only 16% of the vote, but he proceeded to actually make a difference in people's lives. Community-based policing, cutting tax rates, slimming down the work force through attrition, promoting school choice and educational alternatives. He was rewarded with a 70% victory six months later in a city that is only six percent Republican. Jesse Jackson came in to campaign against him and said that he was aligned with the values of the Union of South Africa. The Black population of his district didn't listen; 40% of them voted for Mr. Shundler. He carried the Hispanic population, he carried the Asian population. In a district that is 65% minority, he won an overwhelming endorsement of his policies.

It happened in Raleigh North Carolina where Tom Fetzner became the first Republican mayor in that city's history. In fact, he became the first Republican to ever carry the city. He did it by campaigning on community-based policing, school choice, slimming down the bureaucracy, and performance-based audits of all city departments. And it's going to happen elsewhere. In California, just this last week, the Attorney General of the state of California approved a new initiative, which I predict will be on the ballot in November of 1994. I leave it to you to judge whether or not it will succeed. It's a civil rights initiative, but it's a different kind of civil rights initiative. Next year, voters in California will step into the ballot booth and they will read the following: "An initiative to prohibit against state discrimination or preferential treatment." This is what it says, it's very short. This is the summary: "Prohibits the state, its political subdivisions and agents from using race, sex, color, ethnicity, or national origin as a criteria for discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting. Exempts reasonably necessary sex-based qualifications in public employment, and public education, exempts actions necessary for the receipt of federal funds." The fiscal impact of this is that it will save about \$300 million that will be freed up for other programs.

Now I submit to you, that initiative will strike fear and terror into the hearts of many special interests in California whose entire livelihood depends on stirring up animosities between people and seeking preferential treatment, rather than being judged by the content of their character as Reverend King reminded us we should do. And I think, just like term limits and the Colorado plan which requires a vote of the people to approve tax increases, this will sweep the country. The legislatures who get ahead of this train and start pulling it, rather than running behind it, trying to catch up, are the ones that will be publicly rewarded.

Our biggest enemy in this country today is apathy. So many of your constituents today have just given up on the system. They have been told that they can't make a difference. The problems are too complicated. The bureaucrats and the experts are there to solve them, and all they should do is vote and send in their tax dollars and watch them being wasted. Well, I think we saw with Ross Perot in 1992 that people who had been disconnected and alienated from the political process for two decades

suddenly became energized again. We're seeing it in these state and local initiatives, we're seeing it in the school choice movement. People are waiting to be led. People are waiting to be told, "you can make a difference, we can renew this country, if you get involved again." We have to have some success stories to show them that it can be done, then I think we can inspire them to get involved again. Newt Gingrich says that we cannot renew American civilization in a country in which nine-year old kids are shot dead by thirteen-year old thugs who buy drugs from fifteen-year old couriers, who grow up to be eighteen-year old high school graduates who can't read their diplomas. Well, I'll agree. The problems in many of our cities are so bad that people are willing to take courageous and bold steps. They're willing to follow courageous leaders like Bob Woodson, where they weren't willing to in the past. Remember what Mayor Shundler discovered in Jersey City: That institution which comes to the abyss first, is the first one to step back and do it quickly. Now this will involve political risk-taking. I recognize that. I'm not a naive idealist, but I'm telling you now, that in these pre-revolutionary times, I believe the real political risk in America today is doing nothing. Doing what George Bush did and simply waiting for the problem to go away! George Bush was defeated, not because he took bold initiatives and angered special interest groups, but because he chose to do nothing. The same thing will happen to those of you who are not bold.

Now, I recognize the practical difficulties. You will stir up a hornet's nest of opposition. But let me tell you something I have learned in politics, and I've been around enough politicians to say that this is not just theory, but practice. When you take a bold and controversial stand, you see your opposition. It's visible. You hear immediately, through phone calls and letters and demonstrations. You hear immediately from those special interests whose livelihood you're threatening. You see the opposition up front. What you don't see, and what you don't hear, are the silent majority of people who may hear about your bold stand and bold statements, and say, "finally, someone who's not just a politician." Now they may be so disconnected from politics that they won't write you a letter, because they've never written a letter to a public official. They won't phone you, because they've never phoned a public official, because they didn't think it made a difference. That doesn't mean that they won't appreciate your stand when they hear about it on a talk radio program, or read about it in the newspaper. You may never hear from them, and you may never see them, until polling day when they go into the ballot box and vote for you, perhaps the first representative of your party that they've ever voted for.

But I assure you that you will lose votes by taking these stands. I don't pretend that that's not the case, but you may gain votes you will never see until polling day. Ronald Reagan left office as Governor of California in 1975. I grew up in Northern California and I was privileged to attend his Farewell Address to the California people, which was telecast live over all of the radio and television stations. He said something which has haunted me ever since, because it was so true, and yet so under appreciated. He said that for years the people of the United States have been hushed like children, and told that there are no simple solutions to our problems. They must be turned over to the bureaucrats and technocrats and the experts who will rule our lives for us and occasionally, should they choose, consult us. And, Reagan said, I'm here to tell you that it's flat out wrong.

This country was founded on a simple idea, individual liberty. The Constitution is a very simple document which only fills eight pages in the World Almanac. Reagan said, "I'm here to tell you that there are simple solutions to our problems, just not easy ones." And further, when he became President, he remembered that speech and he read it aloud in its entirety to his cabinet, and he concluded by saying, "We have been entrusted with great power, we have been entrusted by a people who are frustrated with solutions of the past. We will be judged by the extent to which we overcome those difficulties and we take bold steps into the future." And he reminded them, "If not us, who? And if not now, when?" That's the challenge I leave you with. Thank you. ■



VIRGINIA GOVERNOR GEORGE ALLEN

Just one month after his stunning election in Virginia, Governor-Elect George Allen delivered a rousing declamation on the principles of Jeffersonian Conservatism. Allen offers an overview of the issues in the Virginia gubernatorial race and the solutions he offered in his successful campaign. He states that the people of Virginia agree with the principles of Jeffersonian Conservatism, from toughening the criminal justice system, to the privatization of government services and promoting a positive business climate. Allen states that the ideas expounded throughout his campaign are neither Republican nor Democrat, but are ideas that the vast majority of people agree with, regardless of race, color or social class.

Thank you. It's great to be with you. It's good to be with my former colleague and now a fellow patriot for our cause in Virginia, Delegate Steve Martin, and other members of the Virginia Delegation — Robert Nelms, Delegate Peter Way, Delegate-elect Frank Ruff, Delegate-elect Dave Albo, and others who are here. Those folks will be leading the charge in the General Assembly as we go forward with our ideas.

It's great to be with you, the American Legislative Exchange Council. Having been a former member of the American Legislative Exchange Council, I know how important a role this organization plays in helping states be what Thomas Jefferson envisioned, and that is, democracy's grand laboratories for testing new ideas and initiatives and creative policies. Many of the Virginia ALEC leaders, and some of you are here in the room, not only Steve Martin but many of ALEC members and staff folks are helping in our transition team. Looking at how we can actually implement these ideas, not just talk about them, not just postulate about them, but actually act and put them into practice in Virginia so that we can be a model for the rest of the nation. Just so some of you who may not know me, I am a Jeffersonian Conservative. I'm a Republican, but if you want to know what I believe, I'm a Jeffersonian Conservative. And as Mr. Jefferson said, the role of the government is certainly to prevent people from harming one another but otherwise leave them free with their own hard work and their own ingenuity to improve themselves to the best of their ability. And that the government should not take from the mouths of labor the bread they have earned.

Those are the principles I ran on in our campaign. It's the principles of 1800, the revolution of 1800, so to speak, when Mr. Jefferson took over the Presidency, but it's also the principles that I think apply in the 1990s and the years beyond. That's what the government was formed to be. Not to be a meddling nanny or an oppressive enemy, but rather to allow people to achieve to the best of their ability, to make sure that everyone has an equal opportunity to succeed, regardless of their race or their religion or their ethnic origin or their gender. An equal opportunity to succeed.

And the government should give citizens the tools to achieve, which are a positive tax policy and good education, to allow someone to achieve to the best of their ability.

Now that's contrary to the other philosophy, which is guaranteed equal results. There's a fundamental difference between equal opportunity and equal results, and that's the fundamental difference which we find so often regardless of where the races are or the campaigns are across the country.

Many of us in Virginia over the last decade have looked to other states with a great deal of envy because we've seen creative new Jeffersonian policies implemented in such places as South Carolina by Governor Carroll Campbell, in Wisconsin by Governor Thompson, in Michigan by another ALEC member who I got to know, John Engler in Michigan, and even, if you can even believe it, in such places as Massachusetts, under Governor Weld.

I'm here to say that Virginia, with the help of these gentlemen here and many others in Virginia, are going to look to be leaders once again in Virginia. We want other states to again look at Virginia for leadership and reform. And some of the ideas and issues that we're right now poised and ready and prepared to implement in Virginia, originated with ideas and research and background that came from the American Legislative Exchange Council. And many of the folks are right now, as I said earlier, helping us put it into place.

My friends, our ideas are not just Republican or Democrat ideas. Clearly more Republicans agree with them than Democrats, but let's make sure that we espouse these views all over.

I didn't concede a single vote in our election, I don't care where it was, who it was, how they voted in the past. The Hispanic Chamber of Commerce agreed with our philosophy and endorsed me. There is a group called African-Americans for Allen, 80 percent of them were former Democrats but they agreed with our principles. Asian-Americans cared about our ideas on education and job opportunities.

And so our ideas are not ones that have to be looked upon as being Republican or Democrat or broken up by race or gender or region. They're ideas that I think the vast majority of people, if we reach out to people, will agree with, and that's the way that we'll get these policies implemented. We have to reach out and get more people involved, get that broad public support which is out there for the ideas that are espoused by the people who are leading in ALEC.

While many issues contributed to my election victory, there's probably no other more important than the plague of violent crime, and Virginian's desire to have a Governor who will put public safety at the top of the state government's priorities. That was in today's *Richmond Times-Dispatch*. You don't get it up here. You have the *Washington Times* at least. At any rate, this is the editorial page from the paper.

The first thing says "this is Surgeon General Joycelyn Elders' brain." She's holding an egg. Next slide says, "this is Surgeon General Joycelyn Elders' brain on legalizing drugs," with an egg frying in a pan. And then it says, "Any questions?"

Attorney General Barr has given us the sermon on crime and certainly, believe it or not, General Barr was instrumental in our efforts in our campaign. For those of you who are running in campaigns across the country, there is an important lesson that you want to keep in mind that our race, our campaign, offered. The question to the people of Virginia was: do you want a Governor who advocates a five-day waiting period in gun control as the centerpiece of his or her anti-crime policy, or do you want a Governor who'll make your communities and neighborhoods safer by abolishing a lenient parole system and keeping violent repeat offenders off the streets?

The message and the answer from Virginia, loud and clear, is that the people of Virginia are smart. They may have polls that say "Sure, we'd like this and we'd like that." But they realize that the crime is being committed by repeat offenders because of a very lenient parole system that we unfortunately have in Virginia. And when given a choice, across Virginia, they wanted to crack down on the criminals. They were not going to fall for gimmicks.

And that's why the most important issue in our campaign, and one of the most important things that we're going to be focusing on, is abolishing our lenient parole system in Virginia, and restructuring

sentences. William Barr is going to give us guidance and leadership along with Richard Cullen, who is a former Eastern District of Virginia U.S. Attorney, and that's going to be the key thing that we will push. Not just to talk about it on the campaign, but also to execute.

We're also going to show how it can be done in a cost effective and innovative way. Not just to go forward with abolishing this leniency, but also to have these violent criminals serving time, because that's what the Virginians that I know want. But it's not enough to put them behind bars. I want them to work when they're behind bars. Why not have them work and help defray the cost of their incarceration?

Furthermore, we have to look very seriously at privatization. Many of your states, such as Kentucky, Tennessee, Florida and Texas, have privatized some correctional facilities. But in Virginia, they haven't done it yet. They've gone along with that elitist establishment view that the government knows best, and we all know the government rarely knows best. So we can look at ways to privatize that segment of government.

Another key, as Delegate Martin said in our election, was those of us, and many people in this room and across the country, want to have a strong economic empowerment program, people have had enough of the government spending their money wildly and the only solution they ever come up with is raising more taxes. We have to cut government waste, and it's got to be more than rhetoric. ALEC had great papers I remember, on how having higher taxes hurts one state or the other. How every time Massachusetts raised taxes, the folks in New Hampshire would get more prosperity.

The point is the way to create economic prosperity is not higher taxes. What we need to do is streamline our government, privatize services, and look at ways to run the government more efficiently. The first action that I'll implement as soon as we get through the swearing-in ceremony is empowering a blue-ribbon strike force of people from the outside to examine Virginia's government, to look at where we can end duplication. They'll also be charged with looking at regulations, especially these regulations that are stifling small businesses.

The first place to look, and I challenge you in your states to also look, is wherever you have a regulation that exceeds the federal minimums, there ought to be a unique justification why you have to exceed the federal regulations, which are sufficiently burdensome in themselves. Unfortunately in Virginia we have regulations that right now exceed the federal minimums. That puts us in a competitive disadvantage with the Carolinas or Tennessee. We understand in our administration, and ALEC understands, that we're in a war of competition and we're going to make this state a better state in which to do business. We also will look in this blue ribbon strike force will also look at privatizing governmental functions. Its report is not going to sit on a desk or a shelf collecting dust like the Grace Commission's did. Whatever we can implement by executive order, we will. Whatever needs legislative approval, we'll get the legislature to do it, and we'll have the support from the public to do it.

Every member of my Cabinet — whether it's Kay Cole James in Health and Human Resources or whether it's somebody in Natural Resources or Economic Development or Education — all are going to be known as a competitiveness cabinet. Every single thing that they do has to be viewed by a guide as to whether or not what they're doing is going to make us more competitive with other states, make it a better state in which to invest, take a risk, and create jobs. And we always will have open doors and open ears to the citizens, small businesses, corporations and the people of Virginia, to make their government better.

The other thing that has to be reviewed, besides looking at tax laws, are the regulations and the bureaucrats. You have to slip the hands of the bureaucrats, especially with regard to regulations. One way to do that is to put a discipline on the government. We have environmental impact statements for everything — where you have to worry about woodpeckers and louseworts and all manner

of flora and fauna. In the Northeast you have to worry about owls and so forth. And that's fine. But you know what? We also ought to care about people and their property and their jobs, and we're going to require economic impact statements to be done.

So, my friends, we have a mission, we have a full agenda. We want to make sure that we have a comprehensive Workfare program in Virginia. In other words, work rather than idle behavior for able-bodied people in Virginia. We want to revitalize our inner cities with empowerment ideas. We want to address the declining academic standards in our public school systems, not with attitudes and not with a bunch of gimmicks, but with accountability in academics and empowering communities and parents to get involved, and making sure our higher education system is affordable to everyone, not just to the wealthy elite.

But it's also important that you know that we're going to have a positive business climate in Virginia. Virginia is going to be open for business again. And next time ALEC has a meeting, a national meeting around the nation's capital, get on the other side of the Potomac where we share your values a whole lot more than they do here.

My friends, we also realize we have important things to do and we have a common mission in protecting our state's rights from a meddlesome and mandate-infringing federal government. I ask those of you here today to join me in a message to the Congress and to President Clinton, to promise that if he ignores us, we'll mount an all-out effort to protect the people of our states from the pests on the Potomac.

So my message to the President is this. Remember those days when you resided in the Governor's office. Grant our waiver requests. Free us from being federal hostages. Allow our Commonwealth and the various commonwealths and states of the union to be a laboratory for democracy and we'll get along just fine. As far as I'm concerned, when the President's initiatives are beneficial, such as opening up new foreign markets with fair free trade agreements, such as the North American Free Trade Agreement, I'll support him. But if Virginians' rights are threatened or our prerogatives are being usurped by the federal government, I'm going to stand up for Virginians. We're going to oppose the ideas of the federal Department of Education that try to teach students self-esteem. They need to earn self-esteem. We want to have rigorous academic standards, not outcome-based education dictated either by the federal or state government.

And if they have counterproductive tax policies, we'll fight them. And if they're going to come up with a health care program at the federal level that takes away patient choice, takes away the ideas of a marketplace and competition, and somehow doesn't think individual responsibility is important, I'm going to stand up to him and fight him because it's not good for Virginia.

For those of us in a right to work state, if he's going to keep pushing for those striker replacement bills that abrogate our right to work law, I'll stand up to him against that as well. Those of you that are not in a right to work state, stay that way. It gives us a competitive advantage in Virginia.

The people in Virginia have made it clear that we're going to take a stand. We're not just running just for the heck of running, we are here to take a stand on issues. It's important that state legislators, those of you who are members of ALEC, stand with the governors, stand together, stand firm for the principles of federalism upon which this country was founded.

These are exciting times. They are times for great opportunity not only for Virginia but for all of the United States of America, and I look forward to working with ALEC in the years to come to embolden the people, to empower the people, and make this the great country that it was intended to be — for and by the people. Thank you all so very much. ■



HONORABLE CHARLES STENHOLM
U.S. HOUSE OF REPRESENTATIVES

Representative Charles Stenholm (D-TX) has been a staunch advocate of the balanced budget amendment to the Constitution. The 1994 vote on a proposed balanced budget amendment in Congress was very close, and was the topic of Representative Stenholm's address. Stenholm discussed the President's 1994 budget and its failure to cut spending in critical areas. Entitlement spending, such as COA, were pointed out as areas that need to be "on the table" when trying to cut spending. He also explained the political difficulties involved with passing the balanced budget amendment.

Thank you very much. First off, let's just talk about the balanced budget amendment before I talk about some of the specifics and where we are. It was mentioned earlier about the effort to come up with a Constitutional amendment to create a balanced budget, something that I've been working on since I've been here.

There are lots of good arguments against using the Constitution for balancing the budget, and I hear them regularly. But there are also lots of good arguments for amending the Constitution, which Thomas Jefferson proposed early on, but unfortunately, did not get into our original Constitution. Basically, the argument is to keep current generations from borrowing from future generations, unless we borrow in productive assets.

The unfortunate thing about the creation of the red tape that we have seen is that we're borrowing money to meet current operating expenses. We're borrowing the money in order to meet today's wants and desires, not building into our educational infrastructure, not building into our water systems, our sewage systems, our highways, or job creation. We're borrowing in order to meet what people today have basically come to believe is an entitlement.

Now, there are people that are trying to keep it simple, and when you try to keep it simple, and when you do keep it simple, you get criticism from all of those who want to make it much more complex. But basically, it's an eight sentence article. We just say: Total outlays for any fiscal year shall not exceed total receipts. The limits on debts of the United States held by the public shall not be increased until three-fifths of the whole number of each house shall provide by law, and that such increase to be by roll call vote. Prior to each fiscal year the President shall submit a balanced budget. I have not been here quite as long as Representative David Harbuck has been in this business, but I have never served with a President that submitted a balanced budget, and I have served now with four. I just think the President, if he is going to entice the Congress, that he ought to submit one himself. And I haven't seen that yet. But that's one of the provisions we've put into the Constitutional amendment.

No bill to increase revenue shall become a Law unless approved by a majority of the whole number of each house by roll call vote. Now, this is one that gets a little controversial, as some of my conservative friends believe that we ought to have a super majority in order to increase taxes. Well, that might be a good idea, but I don't think it's necessary because I have noticed that politicians who vote to raise taxes don't stay around near as long as those who don't, particularly in this day and age. But again, we try to come up with how we can get 290 votes, and to all of those who believe we need to make it more difficult to raise taxes, I say quite simply, show me the vote. I will be the 290th. But we're no

where close to getting 290 votes for a super majority. In fact, some of the most vociferous opposition to us is coming from those who want a super majority that borrow money, and I don't mind that one at all, because I think that needs to be tougher.

We'll, of course, provide that it can be waived during the declaration of war. We provide the Congress shall enforce and implement this article by appropriate legislation. Total receipts include all receipts, and total outlays shall include all outlays. Now, that is radical to some, but I am one of these that has never understood why some expenditures are off budget. I've really gone mad that no one appreciates what I've heard from so many of you in city, local and state governments, and what you've pleaded to us, which is to quit sending us things that you tell us to do without sending the money. Unfunded mandates.

You'd be happy to know that there is another effort that is going on right now in which, hopefully, there are 218 of us who are going to stop all unfunded mandates. We've got an Unfunded Mandate Coalition, with Pete Guerin of Texas, Gary Conner of California, Pat Roberts of Kansas. It's a bipartisan effort, in which we're attempting now, through an informal caucus, to tag with a red tag, everything that even smells like an unfunded mandate, so that we can warn our colleagues when you're about to vote on these, this is one of those things that people back home are tired of. And we believe that by doing that we're going to have a revolution in that area this coming year.

Let me talk specifically about the balanced budget amendment and where we are right now. We have 260 cosponsors in the house. I can almost count the 290 votes, but I am not going to make that mistake again. You remember last year we counted 303 a couple of weeks out from the vote, and then we lose by 9 because 12 of our cosponsors chose to vote "No" when they had to put up or shut up.

Some interesting things are happening now. Paul Simon is leading the effort in the Senate. He believes he has the votes, but again, you can't count on them until you see that they are there. We're working right now to build the kind of PR support that's going to be necessary to focus on the vote when it occurs in the Senate beginning the week of February the 22nd. That's when the debate will start in the Senate, and finish hopefully, sometime during that week. We came up eight short in 1990 in the House and nine short in 1992.

Now, as we look at this year's strategy let me give credit to my comrades in arms in this one. Bob Smith of Oregon, Olympia Snow of Maine, Jim Inhofe of Oklahoma on the Republican side. L. F. Paine of Virginia and Joe Kennedy of Massachusetts on the Democratic side. Now, I would encourage those of you, as we are talking about this upcoming vote in New Jersey this week, if we can get Joe to express himself to some of our more liberal colleagues. Joe does an excellent job making one point. That is, unless we can bring about a balanced budget and stop borrowing money, the time is going to come that there is no money left for social programs. It will all have to go to pay the interest on the debt that we've built up. It's a simple point but it's a very valid point. One that needs to be made over and over to all of those who believe that balancing the budget is no longer important. And this is what really shocks me. We have conservatives in this country that say debts really don't matter. To some it's just avoiding taxes.

The strategy we followed through the 80s that I was a part of, and I want to try to be as bipartisan as I can in this endeavor, was that if we increased the debt enough we can put restraint on spending, but that didn't work. And it's not going to work. You're not going to have any restraint on increasing taxes or cutting spending as long as you can borrow money easily. That's true in our personal lives, so why would anyone think that it would be different in our political lives. A lot of people believe that somehow we're different once we get elected. I hate to shock you, but we're not. A lot of people will fight you on that comment, but let me give you an example.

We have 260 cosponsors of the balanced budget amendment. Now, I want each one of you in the audience to assume, for a moment, you're the congressman of your respective district. And you are a cosponsor of the balanced budget Constitutional amendment, and you've been typically making speeches if you're for it. You're telling the people that I'm for the Constitutional amendment to balance the budget.

Let's roll back a little bit this year and let's say for a moment when the President's budget was submitted this year, you didn't vote for it because it raised taxes, and it didn't cut spending enough. That was the rhetoric of every one my colleagues. I didn't vote for the President's budget because it didn't cut spending enough and that was my excuse when I voted "no." And I was looking for one more vote, because if we had one more vote we would have been able to have an alternative that would have cut spending and would have done a better job on the deficit. We lost that vote, but those that want it, like Tim Penny, got a concession from the leadership of the House. He said, "I'll vote for this budget, Mr. President, but I demand an opportunity to vote on additional spending cuts before the end of the year." He got it. We proposed \$93 billion in additional spending cuts, and you would have thought the world was coming to an end.

The Administration sent out all of the top guns to kill this spending cut proposal even though they had proposed 2/3 of them themselves. Every special interest group in the country, including the American Association of Retired People, one of the most powerful, that even had a smell of a cut in this bill began to oppose it. And it worked.

But now let's suppose for a moment that you are a member of Congress that has endorsed and cosponsored the balanced budget Constitutional amendment, and you have said, "we need additional spending cuts." Now, what's your speech today? You voted against the budget because it raised taxes and did not cut spending enough, so you're for balancing the budget. But you voted against the spending cuts, which 18 of my colleagues on the Republican side of the aisle did, because not a single Republican supported any budget effort this year in the House. And that was understandable, politically. I don't say that derogatorily just factually. But even more important, 18 of my conservative Democratic friends voted against this too. It is an interesting point. Eighteen, and it would have only taken four more to get the spending cut. Now let's roll forward to next year, which is going to be an interesting budget year, especially since I'm on the budget committee.

We have to begin to cut spending. You know those who have said that balanced budget Constitutional amendments wouldn't work only had to look at state governments. Spending from 1930 in state governments as a percent of total national income has gone from 12% to 14%. But spending in the federal government during that same period of time has gone from 12% to 28%. Don't tell me a Constitutional restraint is not helpful in putting restraint and giving those of us in Congress an excuse for saying "no" even when it means saying "no" to spending in those areas that affect our own constituency.

The one area of the budget that we are going to have to find the political courage to deal with is the so-called entitlements. I don't know where we ever got the notion that we in America are entitled to anything other than a chance. But today people will literally un-elect us if we say that you're not entitled to a cost of living adjustment. In business you can't give your employees a cost of living raise unless you're making money. If you're losing \$250 billion a year as we are in Congress, how in the world can anyone expect to be entitled to a cost of living adjustment, unless you're prepared to say, "I want mine today so that my grandchildren will pay interest on it." The sad thing about this is that when you talk individually everybody agrees, but when we talk politically nobody agrees. And that's what's creating the problem. This year I tried in the budget process to do what some said was rather heretical, but I hope we're going to get it done next year. I tried to put the same cap on entitlement spending that we're putting on discretionary spending.

Now let me point out one area in which the President's budget passed this year deserves more credit than what it's been getting. We put a freeze on discretionary spending. If you read this morning's *Washington Post*, you see we have some interesting problems within the Defense community right now. And I worry about that. We cut a heck of a lot out of Defense. In fact, there's only two areas of the budget that we cut. The first is Defense and the other is Agriculture. And Agriculture is nearer my heart because that's my district, that's my life, that's why I'm here. But we're on everybody's whipping list. The only program that was ever delineated for specific cutting by anybody running for president last year was the honey program. Well, rejoice America, we have cut that \$16 million. It's gone.

We froze discretionary spending and that's something that is significant. Just watch what happens to all of government. My subcommittee is responsible for the reorganization of USDA, and we're going to do it. We have to do it. We've got to take USDA and prepare it for the next century. Agriculture has changed, but government has not. We froze discretionary spending for five years and that's significant, as you know from your own budgets. But what happened to entitlements? We didn't freeze it. Entitlements are going to go from \$750 billion to \$764 billion to \$1,035,000,000,000 in the same five-year period.

You know, here's something else we have to start educating ourselves about. Back home where I come from, if you get a hundred dollars this year, you get ninety-nine next year, that's a cut. If you get a hundred and one, that's an increase. But here inside the Beltway, people literally come unglued if you suggest that if inflation goes up by 3 percent, and you get \$102, you've not been cut. But that's our problem. We're going to have to treat all programs, such as entitlements, just like other aspect of government. And we're going to have to make conscientious decisions, as legislators, as to what is the higher priority and what is the lower priority, and how are we going to live within our means.

That's why I believe that we must have a Constitutional excuse, reason, pressure, pry bar, leverage, whatever you want to call it. We must do that and I encourage you and your individual states to contact your Congressmen and Congresswomen, and your Senators, to join a lot of other interested individuals in putting the proper legislative pressure on us. Could it possibly be that we could generate enough pressure to balance our budget by the year 2000, which is our target? Could we gradually bring the spending cuts down to get us there by the year 2000? Could it possibly be that we could rally America behind us to do that? Somewhat like the other side was able to rally America against the Penny/Kasich bill by saying we want to balance the budget but for heavens sake, don't cut me. That's your challenge. I look forward to working with you. Thank You. ■



HONORABLE TIM PENNY
U.S. HOUSE OF REPRESENTATIVES

The budget process and the failings of a Congress driven by partisanship and public opinion polls, are the topics discussed by Congressman Tim Penny (D-Minn.). Penny expresses his belief that while prevailing public opinion should provide important guidance, it must be balanced with facts and personal conviction, because public opinion does not always offer practical solutions. He also castigates the partisanship that has hampered efforts to balance the federal budget, and expresses his sadness about the far distance Congress has strayed from the principles espoused by our Founding Fathers. Penny also gives a succinct overview of the 1994 budget debate and the subsequent failure of the Penny/Kasich spending cut bill.

I have been in Congress now 11 years. I will be returning home at the end of this term next December. My district in southeastern Minnesota is home to Red Wing Shoe, the Mayo Clinic, Hormel Meats, Land O'Lake Dairies, and the Valley of the Jolly Green Giant. So for those of you who don't know a great deal about Minnesota, that gives you some sense of where I come from.

I have some colleagues here who were introduced earlier. Gil Gutknecht, a Republican legislator from Rochester, Minnesota, the largest town in my district. He is also a member of this organization, and incidentally, one of the candidates to replace me next year.

So I am with a familiar crowd in many respects. I haven't met a lot of the legislators here in this room before, but I do have a sense of common ground with all of you in terms of the approach you take to public policy making and the role you see for government in the lives of American citizens.

I was only 30 years old when I arrived in Washington as the First District Congressman. But it did not take long for me to learn that my concept of public service based on the lessons of our Founding Fathers, was considered an old fashioned notion in the Nation's Capital.

The chief architect of our Constitution, James Madison, and his colleagues, designed a representative democracy whereby candidates would be elected by the people but would be free to balance parochial and national interests, the prevailing political winds and the long term good of the whole.

George Washington, in his first inaugural address, anticipated a Congress with no local prejudices or attachments, no separate views nor party animosities. And John Adams warned against the dangers to America's liberties if the government may become the choice of a party for its own ends, not of the nation for the national good.

These were not idealists in a pure sense. They were practical politicians, but they understood the dangers of fierce partisanship in a legislative environment that was supposed to bring about consensus for the national good.

I learned those lessons not only as a child, but as a student of government at Winona State University. But what I found when I arrived in Washington in 1983, was a situation much different than that envisioned by our Founding Fathers.

Modern day Washington is driven far too much by opinion polls and partisanship. This is not to say that there are no redeeming qualities evident in our Nation's Capital. For all of its faults, somehow it works. In fact, there are moments when Congress rises to a very high standard, such as the courageous action to reform the Social Security Program back in 1983, which was among the first votes I was able to cast, and one of which I am most proud. Also, the serious and the sobering debate that occurred on the Gulf War Resolution in 1991.

Yet I can't help but think that our Founding Fathers would be disappointed with much of what passes for political leadership in today's Congress. Instead of leadership, too often we are given polled readership, which is one of the reasons Congress has been unable to come to grips with the Federal budget deficit.

Opinion polls clearly demonstrate that voters do not like tax increases nor do they like cuts in their favorite programs. No big surprises there.

Republican legislators in Congress eagerly translate that sentiment into a no new taxes pledge, while Democratic legislators position themselves as the champions of popular programs. It obviously sells well with enough voters to secure reelection for most incumbents. But that attitude offers no solution to our budget problem.

Public opinion must be reflected in national policy. That is the essence of our democracy. However, public opinion is not set in concrete, and no surveying can measure accurately the nuances in public thinking on any given issue.

Furthermore, as is demonstrated by the budget debate, public opinion doesn't always add up to a solution. That great philosopher, Pogo, once said, "We have met the enemy and it is us," and in a very great sense, that is the message in this budget debate.

But voters will respond to reasoned leadership. And voters cannot make an intelligent judgment about what needs to occur to balance this budget unless we tell them the facts, and they hear very little from politicians that is constructive and enlightening when it gets down to the budget debate.

My view is that elected officials need to balance public opinion against their own convictions and an analysis of the facts. I think Benjamin Franklin said it best when he wrote, "The internal satisfaction of a good conscience is always present, and in time will do us justice in the minds of the people, even those at present the most prejudiced against us."

Unfortunately, as things stand in Washington today, it falls to retired legislators, like former Democratic Senator Paul Tsongas and former Republican Senator Warren Rudman, to speak the truth about the budget. And as I leave next year, I am disappointed to see a great Republican legislator from North Carolina follow me out the door, Alec McMillan. And maybe we can do, as retired House Members, what Tsongas and Rudman have done as retired Senators, and work together to bring better focus and better information to the American public on this budget issue. As most of you know, Tsongas and Rudman have formed the Concord Coalition, an organization dedicated to the task of educating the American public about the nature of the Federal deficit and the tough, painful measures that will be required if we are to eliminate the red ink. Tsongas and Rudman know that Congress needs encouragement to do the right thing, and they hope to create a coalition of active, informed voters who will support those candidates that are prepared to deal honestly with the deficit.

The example of Tsongas and Rudman is also instructive in terms of the bipartisan nature of the effort. For a decade, Democrats blamed Ronald Reagan and then George Bush for the deficit, while those Republican Presidents attempted to persuade the public that the budget would be balanced except for

the big spending Democrats on Capitol Hill. Again, in today's Washington, partisan finger pointing has become a substitute for decision making.

Early in my tenure in Congress, I lost favor with Democratic colleagues on the Education and Labor Committee because of my willingness to work with the Republicans and my occasional vote for Republican amendments. There was little interest among Democratic leaders in cooperating with the minority party, because after all, the Democrats, by virtue of our majority status, controlled that Committee. Too often, that is the way things work in Washington, D.C.

Republicans, lest you think I am here simply to bash my own party, are not free of blame either. During the recent debate on President Clinton's proposed budget, Republicans were more interested in scoring political points than in offering a credible alternative. They criticized Clinton's tax increases, but when Republican Minority Leader, Senator Bob Dole, offered an alternative plan, it had very little in the way of additional spending cuts and less overall deficit reduction. In other words, it was more business as usual in the Nation's Capital. I became a Democrat in 1960 when I was in the fourth grade. That year I voted for John Kennedy in a mock Presidential election at my country grade school in Mansfield Township in Freeborn County. But our democratic system of government has always been more important to me than the Democratic Party. I have attempted to follow the admonition of the President I voted for that year when he said, "Our task is not to fix the blame for the past, but to fix the course for the future."

I firmly believe that the public will have more respect for Congress if Congress demonstrates more respect for our Founding Fathers and the democratic principles that they espoused. The Founding Fathers were true leaders who well understood and warned us against the dangers of partisan factionalism. They valued majority rule, but stressed the importance of minority rights. They chose a representative form of government because they wanted elected officials to lead and not to simply follow public opinion. After ten years in Congress, I am more convinced than ever that our Founding Fathers had it right.

And as a Democrat, I liken myself to the founder of our party, Thomas Jefferson, particularly when we talk about budget issues. Thomas Jefferson once said, "I place the economy among the first and most important virtues and public debt as the greatest of dangers to pursue our independence. We must not let ourselves load up with perpetual debt. We must make our choice between economy and liberty or profusion and servitude. If we can prevent the government from wasting the labors of the people under the pretense of caring for them, they will be happy. The same prudence which in private life would forbid our paying our money for unexplained projects forbids it in the use of public money."

Simple words and common sense. There is precious little common sense in national budgeting today. That is why I viewed the Concord Coalition as such an inspiration, demonstrating that we can work together a bipartisan way to address the root cause of Federal deficit spending. Demonstrating that the public needs to be better challenged to face the facts about the elements that comprise this Federal budget deficit.

Following on that example, John Kasich, a Republican from Ohio, and myself, worked with a bipartisan group of thirty legislators, evenly divided between the two parties, to construct a deficit reduction plan which came to a vote in the closing days of Congress. As it was mentioned earlier, we came within four votes. I think our great disadvantage is that our measure was brought up just as Congress was ready to adjourn, and the story about these budget cuts was lost beneath headlines relating to the Brady Bill and campaign reform.

Had the public been more aware, I think we would have put this package over the top. But because the public wasn't aware, business as usual prevailed in Washington, D.C. Our package wasn't a cure-all

to the deficit. But it did represent a significant combination of spending cuts, touching virtually every aspect of the Federal budget. It was a \$90 billion package, evenly divided between discretionary spending and entitlement spending. And when you realize that entitlement spending is not only half the budget, but the fastest growing portion of the budget, clearly those items need to be on the table if we are ever going to solve this problem.

Willie Sutton, a noted bank robber, was once asked why do you rob banks, and he responded, "Because that's where the money is." And when the Penny-Kasich Plan put cuts in entitlement programs into our package, it was because that's where the money is and you can't solve this problem unless you address that issue.

But we also took some advice from another noted philosopher, Aristotle, who once said, "A feast to which many contribute is better than a dinner provided out of a single purse." And our sense was to share the sacrifice, to spread the pain, to convey to the American public that all of us have to participate in balancing this budget. We can't simply point a finger at someone else's program and pretend that it alone will cure the deficit.

Bill Clinton in his inaugural address and in his State of the Union speech had the right rhetoric about shared sacrifice. He simply had the wrong budget. We put together fifty-seven Democratic votes in support of the Penny-Kasich Plan and came within a handful of votes of passing the measure. And I think, since I am a Democrat, it bears noting the composition of this group of Democrats and what they were up against.

I believe the fifty-seven Democrats who supported Penny-Kasich represent a new generation of leaders, and they cut across geographic lines. Unlike Democratic budget coalitions of the past, which largely reflected southern conservative defense Democrats, this Democratic coalition spread across the country. Democrats from New Hampshire to California, from Washington state to Florida, from the Rust Belt to the Green Belt, from the Mountain States to the Mississippi River Valley, joined forces to make a strong stand for fiscal responsibility. These new Democrats are out to change the way Washington does business, starting with the budget.

These Democrats reflect the mood of a national electorate that is increasingly skeptical of Washington and hungry for change. It's a safe bet that this budget coalition will resurface in the future, and may even hold the balance of power in the House in coming years.

Of the 41 Democrats who opposed President Clinton's budget in August, a strong majority, 27, voted for the Penny-Kasich cuts. But even more significant and alarming to the Congressional leadership and to the White House, is the fact that fully 30 Democrats who helped make the passage of the Clinton budget possible voted for the Penny-Kasich cuts. With only 43 Democrats required to make up a majority of the House when combined with a united Republican bloc, clearly the White House and the leadership cannot take these new Democrats for granted.

A generational divide was also evident in this vote, and I don't think it should come as any surprise. Of those Democrats supporting Penny-Kasich, nearly 80% had served in Congress less than five years. In fact, a third of our votes came from first term Democratic Members. These new Members have yet to be assimilated into a Washington system that rewards those who spend. And moreover, it seems that these legislators are intent on fighting the system rather than joining the club.

These 57 Democrats stood up to intense pressure from their own party leadership, from the Clinton Administration, and from the interest groups that have historically been supportive of the Democratic Party. Many were approached by powerful Committee Chairmen with not so subtle hints that a vote for Penny-Kasich would jeopardize their standing in the House. Others were literally threatened, in writ-

ing, by Appropriations Committee leaders, sadly both Democratic leaders and Republican leaders, that a vote for Penny-Kasich would kill projects important to their home state.

Before I move on to my next portion, there's a quote from Robert Kennedy that sort of applies to the pressure you get within institutions like Congress. It might even happen in some state legislatures. It goes like this: "Few are willing to brave the disapproval of their fellows, the censure of their colleagues, the wrath of their society. Yet it is the one essential, vital quality for those who seek to change a world which yields most painfully to change." And he wasn't referring to Congress, but it certainly applies. Congress is resistant to change because all of the structures within Congress deal with power and control, and the more junior Members are empowered, the more it threatens the power structure. And frankly, I am a political scientist by education, but it is a misnomer to call politics a science. Sadly, however, in recent years we have gone out of our way to make it a science, with our own acronyms and our own terminology. And when we're talking about the budget, with baseline budgeting and other terms that really don't honestly convey what's going on, we've sort of shut the public out, we've sort of shut the people out, because they can't figure out who's telling the truth.

When Democrats say we've cut a program, for example, we cut Medicare in Clinton's budget by \$56 billion over five years. Sounds big and it sounds painful. But, Medicare spending will still increase by 45% over the next five years.

So the debate in Congress is essentially dishonest and is meant to confuse, not to enlighten. It is meant to kind of keep others from getting into the game. And that is why interest group politics is so prevalent in Washington, D.C., because those are the only organizations in America that can afford to hire somebody, a lobbyist, to get into the game with the politicians. We have excluded the public, and it is no wonder they are losing faith in this system of government.

But within the institution, because power is where it is at, and control is what it is about, newer Members are subjected to intense pressure from senior Members to toe the line, to get along, or you will not be a success.

Gil Gulknecht was in my office recently, and it was coincidental that he made reference to a quote that I saved for my quote file, and it is from Mother Teresa, and it goes something like this: "God did not call on us to be successful. He called on us to be faithful." Or maybe paraphrased for those of us who are public servants, He called on us to serve. And in Congress there is too much pressure from the more senior Members to do what they want for their purposes under the guise that somehow it is going to make you a more influential player for your purposes. And it is hard for newer Members to stand up to that.

In addition to the internal pressures, a daunting lobbying effort was launched by a variety of key Democratic support groups, from organized labor to social service advocates. Although it received relatively little media attention, it was one of the most intense lobbying efforts against a legislative proposal seen in recent times. In fact, if you listened to any of the debate or read any of the accounts of this debate, you may have heard the Administration and other special interest advocates claiming that somehow the Penny-Kasich cuts, which represented one cent on the dollar over five years, not terribly Draconian, would destroy the economy, derail health care, undermine our nation's defenses, and cripple our domestic agenda.

It reminds me of the adage that a half truth is like a half brick. You can throw it twice as far. That is what we were up against in this. And it worked, because the interest groups ginned up phone calls and letters to Capitol Hill, urging Members to vote no. Freshmen Members were somewhat surprised to find out that the interest groups could generate as many calls as we got in opposition to this bill. But that was the case. The phones rang off the hook leading up to this vote. Not from the general tax

payers, but from members of interest groups who sent mailings, outrageous mailings, telling them that Penny-Kasich was a threat to everything they believed in.

At the risk of alienating all of these constituencies, the 57 Democrats stood firm. It is important to note that these new Democrats are not inclined to cut every category of spending simply for the sake of reducing the deficit. However, they do understand that long term economic growth requires less government borrowing and more private investment. And they also know the difference between consumption spending and investment spending.

And if you look at our list of cuts, they were focused on the consumption side of the budget. These Democrats understand the difference between a COLA and a highway. There are differences in the way those dollars spend out in our economy. There are differences in terms of what each of those dollars means to the long term strength of our economy, and these Democrats know the difference.

They desperately want to change today's budget policies which represent borrowing from the future to pay for the present. And more importantly, these Democrats evidenced their willingness to work with the Republicans. There is nothing wrong with bipartisan cooperation. That is the essence of the democratic system. We're to come together and work together towards a consensus. Not to say that we can't have differences which may manifest themselves in a partisan fashion once in a while. But partisanship should not be our primary purpose in public service, and for too many politicians, it has become so.

And while I am a Democrat, it distresses me to admit that while Republicans are 40% of the Membership of Congress, they perhaps have 14% of the influence and power, and that is simply not right. It is undemocratic.

Let me close with two quotes. The first from George Bernard Shaw. "Democracy is a device that ensures that we shall be governed no better than we deserve." That's perhaps a more cynical observation than I would like to make. I prefer to use a 60 year old quote from Walter Lippman, because it applies to today's political environment in which the public is clearly in a state of agitation and displeasure with what they see in the political arena. And these are Walter Lippman's words: "Those who are in revolt are looking for new leaders. They are looking for leaders who will talk to the people about their duty and about the sacrifices they must make, and about the discipline they must impose upon themselves, and about their responsibility to the world and to posterity."

Americans, throughout our nation's 200 year history, have always been willing to rise to the challenge when properly called upon to do so by real leaders who don't hide the facts from them. We need a more honest debate in American politics today, not one driven by opinion polls, because those are transient measurements. Certainly not one driven by partisanship, because that stands in the way of progress. We need leadership in America that will challenge American voters to face the facts and face the future. And when called upon to do so, I am confident the American people will respond. ■

NATIONAL ORIENTATION CONFERENCE
DECEMBER 1993
WASHINGTON, D.C.



ROBERT L. WOODSON
PRESIDENT
NATIONAL CENTER FOR NEIGHBORHOOD ENTERPRISE

Bob Woodson, founder and President of the National Center for Neighborhood Enterprise, discussed the urban problems that face our nation today. He argues that we must change how we approach solving the "problem" of poverty and violence in our inner cities. He indicates that we must not treat inner city neighborhoods and their residents as "passive agents" in solving these problems, because in order for a solution to be successful it must involve the people that will be affected. Comparing the inner city to the human body, Woodson says that we must tap the ability of the inner city to "heal itself," stressing the importance of empowering people to be agents of positive change.

Thank you. I want to just say how much of an honor it is to share the podium with John Fund and Samuel A. Brunelli and all the other distinguished people. ALEC is one of my favorite organizations. Speaking here is like coming home. A lot of times, our views expressed are not always popular, but that's all right.

I would first of all like to have you meet the speaker of my house, Ellen Woodson, my wife, who I dragged out here this morning so she would know what happens when I leave the house. So she won't have to ask me, what is ALEC? And also the National Center sponsors every year what we call our low income communities night, and that is our achievement against the odds, and ALEC was one of the sponsors this year and many of you attended. And we have one of our first awardees here, Ethel Branch Cooper. And of course, I am always honored to be with David Caprara. David Caprara is one of those inspirational people when you're around him you just feel better as a consequence. But Dave has always put his body and his mind where his heart is. And he is the arms and legs of the empowerment movement and one of the principal architects and chronicles of the recent resident amendments to the housing act. It was David who, as a staff member of the National Center, sat with the resident leadership in the room and helped craft those seven amendments which were passed into law 430 to 0 in the House. With the opposition of all the major unions and the housing authority, we beat their brains out very good. When I spoke at your Michigan Conference afterwards I got some invitations to address prayer breakfasts as Rev. Woodson. Let me just say that I am honored to be addressed as a minister.

But I am a Baptist. There was a time when 80% of all black folks were Baptists, and then we learned how to read and then became Methodists. Then when we went to the universities, we became Presbyterians, and when we learned how to split intellectual hairs, as to whether God could be three forces, we became Unitarians. But when trouble occurs, we all come back to the rock. So, I am a black Baptist that has come back to the rock. So, a lot of my views and opinions are expressed in the belief that the crisis we are confronting today is not a crisis of program, it is not a crisis of policy. It is a moral and spiritual crisis.

I'd like to talk about solutions to the urban problems that confront us today, with an emphasis on what can be done to stem the tide of violence. Because we do have some concrete experience of solutions that work. I think we spend too much time celebrating problems when we need to talk about solutions.

I have said on numerous occasions, and you are well aware, that some of the traditional approaches have failed.

Someone once said, if you want to go someplace you've never been, then do some things you've never done. That if we keep doing what we do, we'll keep getting what we got. Which means that we've got to redirect not only our thinking, but in some cases, our beliefs. People do not do that which they do not believe first. And so many of us have been conditioned to believe, by traditional top-down government approaches to program. And yet we have known that the \$3 trillion that we have spent on poverty has not worked. And poor folks now realize that which was spent in their name hasn't worked. Many poor people are like that fellow that staged a sit-in for 9 months at the Mississippi lunch counter and when they integrated they didn't have what he wanted.

There's nothing more disappointing. But we have got to understand that solutions exist if we begin to approach the problem from a very different paradigm. A paradigm to me is merely a prism through which we see problems or opportunities. And the prism to which I see the solutions to some of the problems is the analogy of the human body. God has invested a human body with the power to heal itself. That the natural state of the human body is one of health, and that's why, whenever you intervene or intrude into the body, it rejects anything that is imposed in it. That's why to impose a transplanted organ into the human body, you have to try to fool the body into believing that what's being done to it is in its interest. That's what repressive drugs attempt to do.

We have been trying to impose solutions on grassroots and low income communities for years and we wonder why those imposed solutions don't work, because the body's natural inclination is to reject it. And that's why grassroots people reject that which is done for them on a mistaken belief that they are merely a passive agent in everybody's fantasy about what is in their interest. And so many times, we fail to understand that indigenous to the human body is the power to heal itself. Neighborhoods are organized the same way. Indigenous to neighborhoods are the capacity and ability to heal themselves. The most effective form of treatment of the human body is when you insinuate medicine in such a way that you trigger the body's own immune system. That's why AIDS is so devastating, because it interferes with the body's ability to heal itself. So if we look at strategies that we have been employed over the years, it is almost like the old story in the 1960s of the Andromeda Strain. I am a lover of science fiction movies. And one thing in the sixties that really struck me was the Andromeda Strain. Maybe you remember the movie in which this missile's nose cone went into space and came down in this little town and killed everybody, except an old man with asthma and a baby with colic. And so some scientists came in with their suits and took this man and this baby, and took the nose cone down about eight levels into this laboratory to study why it was killing, so that they could find out how to cure it. But they could not understand why everybody else died except this old man with asthma and this little child with colic.

And so, instead they studied this nose cone, and they had an electronic microscope that was focused on it and they were trying to analyze just what happened. Scientists in the laboratory began to die. But what was going on here? Was it a virus? A bacteria they couldn't find? Finally, they concluded that the very instrument that was used as the means for producing the cure was creating the problem. The virus was being fed by electrons from the microscope. So the very agent that was put in place to cure the problem was creating the problem.

And a lot of what we have been doing in poverty programs have, in fact, had the same effect as this electron microscope. It has reinforced the very agents it was developed to cure. Look at the years between 1930 and 1940, the years of the Great Depression, when we had a zero GNP growth and a 25% unemployment rate. What impact did it have on family dissolution? Was there a great epidemic in drug addiction? No. Were families dissolving? No. Did we have tremendous crime problem? No. Could people walk in their neighborhoods? Yes.

Even in the black community, from 1940 to 1972, we saw the greatest growth in the economy, yet we saw a decline in those social indicators. The black community is often used as a moral barometer of the health of this nation, yet up until 1959, only nine percent of black women had babies out of wedlock and thirteen percent of white women had babies out of wedlock. This was a time when, in fact, we had no political representation and no representation on the courts. We were being lynched everyday in some places in the south. Yet, even in the face of all of these tremendous social odds, the black community's moral and social infrastructure shielded it against all of these threats from without, and we thrived. But precisely in the presence of the electron microscope, i.e. the poverty programs, and all these other instruments that were supposed to cure us, we have seen a nine percent illegitimacy rate going to sixty percent, and in some communities eighty percent. That's a tremendous increase over a short period of time, and only a fool would ignore the possibility that the instrument put in place to bring about the cure, like the electron microscope, is creating the problem.

What we are finding is that we keep looking to the wrong place for the solutions. Racial discrimination is a problem, it is not the most important problem. It is not there because of the person in the White House. Decisions made in your own house are much more important than decisions made in the State House or the White House, if you allow me that Jessie Jacksonism.

And so, even in the face of these problems we did not tear each other apart, we did not have the crime rate. What has happened is that a lot of these electron microscopes that we put in place have undermined the moral and social centers of influence in the community, so that people have now become detached from that which has insulated them in the past. Therefore it doesn't matter that we have increased social spending. And I'd like to talk about that paradigm, the human body, and about those families and people throughout this country that aren't experiencing problems. You've got to look at the glass, the part of the glass that is half full, and not the glass that is half empty. Yes, there may be 60% of households with out of wedlock births, but there's 40% that are not experiencing these problems. And the question is, what explains the success of those exposed to the same environment as those that were not? As in the case of the Andromeda Strain, they found that the baby with colic and the old man with asthma generated some internal chemical response inside the body that acted as an insulation against this virus.

And so, what we don't do in society is study why the baby and the old man survived to determine what lessons we can draw from those who have survived in the presence of the disease. I asked criminologists, social scientists, the whole academic community, including a lot of my conservative colleagues, how many of them have ever gone to low income communities and inquired about why certain people are able to raise children in the midst of poverty without them succumbing to poverty itself? How they can raise children in the presence of drugs without producing drug addicts? How they can raise them in the presence of criminals without their children succumbing to criminality? We do not do anything to study why certain low income people survive and thrive, to determine what our new solutions to these problems should be.

We, at the National Center, spend all of our time studying success. If you want to learn what works, you have to find out what works. You don't go to someone who has failed and say, "let me study your failures so we can learn what is successful." Would you go to somebody who has lost 10 elections and say, we want to study why you didn't get elected, so we can know what strategies to put in place. No, you go to a person like Dave Halbrook, a man from Mississippi, a white man from Mississippi, who is elected in a district with a 74% black population and ask him how he achieved what he did, because he delivers for people. He knows that what you've got to do is go to people and speak to their real needs. So, it is not enough for us to recruit low income people who have succeeded as props for our policies. We should go to them and study why they survive and determine how we can develop policies that are responsive to their survival techniques. We must find out what they need in order to promote their self-development and the development of others like them. So we really need to do

things like what we did in Philadelphia. In 1983, the city of Philadelphia was plagued by wolf pack attacks, groups of young blacks between the ages of 15 and 17 in groups of six, were attacking shoppers, knocking them down, taking rings and purses. They got so bad that the Civic Center had to close down, as did movie theaters and shopping centers. The police increased their patrols but nothing worked. The social service hustlers came in and that didn't work, of course. And so, people were perplexed.

So, we went to a group of grassroots leaders, eight of them, and asked, "what is it that grassroots can offer that all the traditional approachers cannot?" And they did something very innovative. They said, "why don't we go to the house of corrections, or prisons and sit down with the inmates and ask them if they would join a crime prevention task force." So we went to the prison and 125 inmates signed up. They each gave us the names of three young men from their neighborhood and said, "bring them to the prison for us to tell them that this is unacceptable behavior. Because they respect us."

And so we got some money from an entertainer and rented school buses on this one Saturday and brought 300 of these young men to the prison. And we had a table with food and the inmates had sessions and seminars with these young people. And they told them that this was unacceptable behavior and the following Monday, the wolf pack attacks stopped all over the city. And it never started again.

In other words, what they did was take part of the disease and apply it as the solution. Because these young men, even in prisons, said, "no one ever came to us to ask us for solutions. Only for what we have done to create the problem, and what you have done by coming to us like this is to give us the respect, give us an opportunity to demonstrate that not all of us are vacant of values, are vacant of concern for our community. Some of us only need an opportunity to express to you and to our city our capacity not just to hurt, but also to heal." The challenge that we face is, are we willing to look to these indigenous healers, these indigenous antibodies? Are we willing to bring them to the table and ask them what they can offer by way of solutions, and then try to help? You have to understand that what stops crime, what stops violence, is not more prisons or more police on the street, even though they all may be needed.

It is when young people have lost a sense of moral content, when life no longer has meaning for them, that it does not matter what you do to them, because they don't expect to live anyway. Why would they be afraid to go jail or afraid of the death penalty? That's like threatening a kamikaze pilot with death. Death is his business.

And so the only thing that challenges these young men on the streets is when you go to the centers of moral power. Many of these young men who are leaders in this community have had religious conversions and they bring people to God in their own way. If we are serious about stopping crime, then we will do what we can to empower those that have the power to influence the moral decisions that these young people make. Empower those that can bring content to their lives and a sense of purpose.

When Cain killed Abel, God could have just struck him dead, but God did something worse. He told Cain that he would travel the rest of his life without purpose. And a lot of young people are living in hell, not because of poverty or anything else, but because they have had purpose withdrawn from their lives. And the indigenous institutions, those moral centers, have the capacity to restore their sense of purpose so that they have something to lose. And when they have something to lose, then they will work for something that they can gain. Only then will we see a change in our society. Are we up to it? God bless you. ■

NATIONAL LEADERSHIP SUMMIT ON ECONOMIC GROWTH
APRIL 1994
SAN ANTONIO, TEXAS



HONORABLE JOHN SHARP
TEXAS STATE COMPTROLLER

As Comptroller of the State of Texas, John Sharp is responsible for finding new methods of providing government services for less money. In this address, Mr. Sharp outlines what he has learned in the process of reforming wasteful government programs. Mr. Sharp finds that government and business operate very differently when they are in financial trouble, and, most importantly, compared to business government has "forgotten who their customers are." Sharp contends privatization of government services and bringing market competition and accountability back to government are necessary solutions to reducing the spending costs of government.

Thank you. I just want to make a note that what Harold Brubaker was talking about regarding the spotted owl is going to make a hell of a lot of people in East Texas and the southern United States rich. If you go into East Texas and you go into the southern part of the United States right now, you will find something that is overlooked by a lot of people. And that is the fields that were once wheat, and things like that, have all kinds of seedlings on them right now because of what has happened to lumber prices. It is really a remarkable story of what happens sometimes with regulations and the resulting economic impact.

For those of you that are worried, even though I've got the whole two hours to give the speech, I don't give long speeches. I give short speeches. Warren Chisum will tell you why I give short speeches. It's because we had a special session of the Texas legislature one time on a sexually transmitted cattle disease. I know, that's hard for some of you people to believe, but we did. I didn't know a lot about it at the time, but fortunately, I, nor none of my roommates had ever had that particular one, and so, I had to go. But I know my district was anti-disease and that's the way I voted.

So anyway, after the session was over Chisum and I had to go up to West Columbia, Texas to give a speech to the Independent Cattlemen Association of Texas and cattle raisers and the farm bureau, etc., on how I voted on this cow disease.

We were promised a thousand people would be listening to our explanation, but as I went down to this place, there was high water, there were downed power lines and trees on the road. It was terrible. I had written an hour and fifty-eight minute speech. I took two weeks to write pretty much everything you'd like to know about this particular cow disease.

So, we got there and we waited forty-five minutes in a hall that did, in fact, seat a thousand people. And six people showed up. And what happened was Hurricane Alicia had come through four days before and they forgot to tell me. Warren and these six other Aggies that this deal had been called off. That's how many people showed up. Six.

One gentleman, who was 92 years old, his name was MacAlister, said, "Look boy I came through about forty miles of this stuff. I want to hear the speech." And I said, "That's great. I'll give it a try because I won't be asked again. This is my last shot at it. I appreciate the opportunity." So, the other

live left and I began the speech. After an hour and eight minutes, I had lost him. He didn't die, but he was asleep. So I walked up to him and pretended I was done, and I asked what he thought about the speech. And he woke up and cleared his eyes and put his hand on my shoulder and gave me the best political advice anybody has given a young politician. He said, "Look here boy, I run 426 head of mothercows and their calves, and when the winter is cold and hard and there's nothing for those cows to eat, I go out there once a week with a whole truckful of hay to feed these cows. But I want you to remember something as long as you're asking folks for a vote." And I said, "Yeah, please, Mr. MacAlister, tell us." And he said, "If only six cows show up, I don't drop the whole darn load on 'em." So, I try to remember that, and as a result, I give reasonably short speeches and I'll do that pretty much today.

A bit of warning for those of you that are from out of state. We want you to buy lots of lottery tickets while you're here. We're tired of policing our own people, so just participate in the whole deal.

One of my jobs, and thank God I don't have it anymore, was to start up the lottery. I had the lottery for the first eighteen months or so, and then I turned it over to some other agency. But, let me give you this warning about that particular business.

First of all, the odds of winning are 16 million to one. Yeah, you say it's not bad. Consider that your odds of getting struck by lightning while you're here is about 15.2 million to one. Your odds of getting attacked by a shark, even though you are 200 miles from the water, are only 13.2 million to one.

Let me tell you this one story, and this is a true story, and I know you expect nothing but the truth to come from the mouth of an elected official. But when I was running the lottery, my best friend, who is a deacon of a very prominent Baptist church in Austin, Texas, walked into my office one day with a \$2,500 winning ticket. He said, "I want my cash." I said, "Fred, we don't do cash, this is a government organization. We write you a check." And he said, "can anybody find out about that check?" Yes, I said, "we have thirty pastors that have open records requests everyday for any and all winners above \$600." And he said, "forget it, it's not worth it."

So he starts walking out and I grabbed him and I said, "look, you're an attorney, you're a learned man. I'm just an Aggie with a bachelor's degree, but I can tell you that anybody that walks in with that ticket, we will give them \$2500." He looks at me and I said, "if your secretary or a law clerk walks in with this ticket we will give them the money. Then he can give you \$2400 and keep the hundred. Surely there's somebody who wants to make a hundred dollars." "Oh," he said, "that's legal?" Right.

Anyway, he does. He goes into his firm, he picks a brand new law clerk. She is about twenty years old, and he says, "Would you like to take this ticket across the street and make a hundred dollars by cashing in and give me \$2400. Won't that be wonderful?" He borrows a friend's red and black Volvo with tinted windows, drives her over to the lottery headquarters, waits in the parking lot, sends her up there.

She's been up there forty-two minutes and when she comes back down she's crying. He said, "What's the matter?" And she said, "They took our money." And he goes, "What do you mean, they took our money?" And she said, "I sort of had a bad student loan two years ago."

Now, he pretty much took that as a sign that he didn't want to play, but I can promise you, I and that law clerk owe him. She will be a partner before long, and he's one of my biggest contributors, and I appreciate it.

So, if you have bad student loans, if you're behind on your child support in Texas, or worse, if you owe me some money, don't cash in your lottery tickets.

But that lottery is a little bit of what I want to talk to you about. All this stuff about reinventing government and this stuff that's going on all over the place, it's no different than what went on at General Motors, and what goes on with most of corporate America now. Nor is it different than what has happened in most families, certainly in most Texas families, since about the mid-1980s.

And that is, that every family, virtually every business organization, big and small ones, in Texas, and I would assume in the United States, has had to provide the same services they have always had to provide, but they, in many cases, have had to do it with less resources. And that is what the Texas legislature ordered us to do.

What the Texas legislature ordered us to do was not to go in as it happens time and time again, as we all know and say when it is budget time — cut a billion here, a billion there, until we get to where we want. Maybe it will pass, maybe it won't, but at least we gave it a shot. They gave us some very specific orders and the orders that they gave us was that the services that we are now providing we want to continue to provide. We want to feed the same number of poor people. We want to take care of the same number of poor indigents. We want to send the same number of kids to school. We want to send the same number of kids to college, but we want to do it without it costing us much. And that is not much different than what is going on in most families. They have had to send the same kids to college, they have had to put the same three meals on the table every day, and in many cases have had to do it with less resources than they had in the 1980s. And so, that is basically the approach that we're talking about.

And the only real common denominator about all of this is one thing: who are your customers? The difference is that business remembers its customers a lot easier than government remembers its customers. Government, certainly Congress, would never allow any business to create a monopoly. But every time Congress meets, they create a monopoly. They just call it a federal agency or they call it a commission or a board, but it's a monopoly. It is a monopoly in many cases that has a difficult time remembering who it works for, and whoever it is they are supposed to be serving, including the people that pay for their salaries.

In this process, we think we learned a few things. One thing that everybody in this room knows, or it should be obvious to anybody who has served twenty-four hours in a legislature, that the hardest thing to do in government is cut spending. The second hardest thing to do is to raise taxes. That's why the second hardest thing happens a lot more than the first hardest thing. There isn't anybody from your district who ever goes to Atlanta or Austin or Sacramento and says, "I don't want so much money coming into my business." Nobody has ever experienced that. No member of the Senate Finance committee or House Appropriations committee has ever had your most conservative constituent say, "Jimmy Joe, you're sending in too damn much money. That doesn't happen."

And it does not happen in the Congress of the United States. The difference between most of us and the Congress of the U.S. is that we have constitutional provisions that keep that kind of thing in check. It's called a balanced budget, and they don't.

Now, the other thing that we learned is that business and government, when they're in a pinch, act real differently, and I'm sure everybody in this room knows this too. When business has to cut back, they make sure that their customers never know, if it's possible. If a bank had to let a teller go in Texas in 1985, the bank president would take care of that customer and would do what he had to do. When I had to lay people off in my real estate and restoration company in 1985 and previous to that, which is a lot of laying off, if that phone rang and there was not a receptionist there, the partners in that company would answer that phone. We could not afford, nor can any business, to let our customers know that we had trouble. Or that we weren't going to be able to serve them as well as we always had. Business knows that it has to make those customers happy to survive.

Now think about how your bureaucracies treat you. It can't be any different in your state or ours or Washington or any place else. These guys in Texas, or any place else, try to cut the budget and they are met with resistance. For example, the old Texas Water Commission. The water commission, all of a sudden, would not let permits go out for three years. It usually took no longer than three months to get a permit. And when the business, whether it was Houston Industries or whoever, went to complain to the agency, the agency would say, "Well, you know, we need 300 more people. If you can talk to chairman of the House Finance or House Appropriations Committee and have him give me 300 more people, we'll probably get to process your permits as fast as we always did, but since we're so short-handed, it's going to take three years to do it." It's all blackmail. It's bureaucratic blackmail and everybody in this room has had to put up with it.

The same thing occurs in hospitals. We were doing some things with one university here, and the chancellor stood up and said, "This is going to eliminate indigent funding in South Texas." It didn't have a damn thing to do with indigent health care funding, but it sure made the headlines.

And all kinds of things that you have to put up with because those agencies have forgotten who their customers are. They thought they were the customers and they forgot that the people out there were the customers. The agencies didn't really care how they got their money. They got their money by lying and stirring up people, and enraging people and causing 15,000 letters to come to the legislature, which was just as good as getting it by doing a good job. That's a big difference, and so you have to find ways to remind them who their customers are.

The third thing that we learned is the difference between the Republicans and Democrats when it comes to spending. Here it is. I have three years of research. Both of us would spend every dime in the Treasury, but Republicans feel bad about it. When you find anything else in this process, let us know.

The last thing that we learned was that competition works in government just as well as competition works in the private sector. The problem is government will always figure out a way to try to not make it work instead of making it work. Let's have one federal example. And I would hear about it when I was in the Army and it is true in every survey that you look at. If you ask the veterans of the U.S., what is the single best program the U.S. Congress ever passed that you are happy with, they would tell you, without question, it's the GI bill. What did we do with the GI bill? We didn't create a monopoly. We didn't build a bunch of U.S. veterans universities and say, here's where these men and women have to go. We gave them a voucher and we said, make every college and university compete for your voucher until you're satisfied. And it remains the most satisfying program today.

When you ask those veterans what is the most unsatisfying program that the Federal government has ever passed, right or wrong, they will tell you in survey after survey, it's the VA hospitals. I always get in trouble when I say that, but the problem is that it is a fact. And what did we do with VA hospitals? We created a bricks and mortar monopoly and we told those veterans that that's where you're going to go. And the person that ran that hospital knew that they had a captured clientele, and sometimes the service is good and sometime it is bad, but that's where they went. It makes you wonder what would happen if the Congress would have said to the injured and disabled veterans, here is a voucher. Make every hospital in the United States of America compete crosswise with you for that voucher. I suspect that the result would have been very different. The satisfaction rate of those veterans would have been very different. And there are more examples in education or anything else that exists in government. The only difference is that government will try, in protecting its own interest, to find a way around that and try to make the competition not work. And that certainly is always a problem.

One of our recommendations had to do with food stamps. Just think about that particular program. Think about how it works. First thing you do is chop down the forest trees. Because that's how much

pulp you need to generate the paper to print billions and billions of dollars worth of food stamps. You still aren't feeding poor people and you have lots of paper. After you do that, you take the paper to Stanley Kragman, who is the CEO of the United States Bank Note Corporation in New York City. He's the only person in the world that prints food stamps. You paid Stanley \$84 million last year to do nothing but print food stamps. All right, you got the paper, you've paid Stanley and you still have not fed poor people.

After you do that, then you have to get distribution trucking companies and secure couriers because food stamps of course, are as good as cash. And you have to deliver them to your distribution centers in Dallas or Atlanta or wherever it is. In Texas we paid those companies \$6.1 million last year to deliver the stamps to the distribution centers. And then from the distribution centers, you have hundreds of people, if not thousands, that take the stamps and put them on envelopes and, until last December, delivered them to the U.S. Postal service, who never put a stamp on it, and distributed it from the post office. Still it was one of the top three things stolen by the U.S. postal service last year. It didn't take long to figure out who was stealing those stamps.

After you do that, you drive grocery stores crazy. In South Texas, among HGB stores, the number one turnover rate is among people at night who had to reconcile food stamps with actual purchases. I assume under the threat of federal indictment or something. And then you drive banks crazy. Nation's Bank in Austin Texas alone last year spent \$460,000 doing nothing but reconciling food stamps with its purchases down, in its basement, to deliver to the Federal Reserve in Houston so that they can trade it in. And Stanley can print another 400 million next year.

And then, all of your constituents lose faith in the program because they have seen on Prime Time Live where some guy bought a house with food stamps. And they have been to the grocery stores. And you have heard story after story about some old boy in a Cadillac that used food stamps.

We once followed one of those guys, by the way, and he would not have qualified for food stamps. He never received them. He ran a bar. And what he was doing in the bar was taking two dollar bills for drinks or five dollars worth of food stamps for the same drinks, and then using the money to buy food for his own family or sell them to somebody else.

And you see instance after instance where narcotics officers in major cities would tell you that as much as, or maybe more than, forty percent of the cash in drug busts is food stamps. That's a problem. You can buy almost anything with food stamps that you can buy with dollar bills. How do you eliminate that? How do you eliminate Stanley? How do you eliminate the trucking company and all those other things in the system? The technology has been here for fifteen years but our agencies have not moved, except for pilot projects in Maryland and Rochester, New York and some other places, and there has not been much press on it.

We decided to take that on a couple of years ago and we signed a contract about a month ago. This September the project will begin in Houston, and it will be state-wide, and food stamps will be eliminated in Texas by about January of 1996. What will exist is a card, a Lone Star card, because that's what we decided to call it. It's a little card and it has a pin number on it that will work only in a grocery store and it will buy only food. Cigarettes, beer, nothing like that would scan through that card or it will be automatically rejected. And the money goes directly into the banker's account.

Sounds like a good deal. Who in the world would be against that? I promise you, Stanley was against that. Stanley and some of the check cashing folks in Chicago and other places had every lobbyist they could afford in Washington, D.C. And every time we went to the Department of Agriculture, every time we went to the HHS, we kept hitting their brick wall. Even with the Federal Reserve we had problems. And it finally dawned on us that we were up against this lobbying effort to protect food stamps. So,

once we realized who we were really up against we were able to make our case. And by January 1996, if it goes according to schedule, food stamps and food stamps fraud as it exists, should be non-existent in the state of Texas. And we know that Florida, we know that New York and some other states have RFPs that are coming out in the next month that are pretty close or identical to ours. We think the same thing is going to happen all over the place.

I use that as an example because that is what the legislature told us to do. They told us, feed all the poor people that are being fed right now. You figure out a different way to do it. And that's what government has such a darn tough time in doing. I hope I never have the experience that I had with Congress when we were working on the national performance review. The people working on it were well-intentioned, they set up the right mechanism, but when you deliver that package and ask them to change what's going on, that's almost an impossible task.

Consider what's going on at Customs and the regulation of the Mexican border. There are about 20 agencies that control things coming back and forth across the border. Customs, INS, Agriculture, Treasury, all kinds of agencies in there. And when you go to the Congress and say we want to change that, we want to make it more functional and have only one group of people doing it, what you find is that the forums that Congress imposed upon itself a decade or so ago are causing complete and total disarray. Because you have 20 agencies sitting over there, each one of them getting their money from a separate subcommittee chairman who has used it as his own personal fiefdom, and he is not going to give that deal up. The chairman has a symbiotic relationship with that agency that resembles incest, and they are not going to let the thing go. And as a result, they all get together and say, better to have a mess than to have something like that.

And that's the problem with the Congress of the United States. The Congress of the United States should never have probably gone out and appointed all those subcommittee chairmen. It probably should have run it the way Mr. Mansfield used to run it a long time ago, and we wouldn't have that particular problem.

Another example, if I could, has to do with the lottery. One of the things that the leadership of the legislature told us to do is figure out a way how to run it cheaper than it is run in other places. This lottery in Texas has 7.1 percent overhead, which is unusual in that the average overhead for lotteries is about 15 percent. Florida has about 800 employees and California has close to a thousand, something like that. This one has 189, which happens to be the same number of people that were in Alamo, and has nothing to do with the way to run the lottery.

But the reason it has 189 is because it is a business-driven operation. Over 210 businesses, mostly in Texas, have contracts with the Texas lottery. We didn't go out and build a bunch of warehouses and we didn't hire a bunch of truck drivers and a bunch of delivery people. We found this company called United Parcel Service that amazingly enough knew how to deliver lottery tickets to a 7-11 store, having never done it in Texas. We didn't build a computer system. We don't own anything in those stores. It is owned by businesses, and every single one of those businesses know that they could be out of business in six months if somebody comes along with a better deal. It is called competition. And that is what makes the lottery operate with a 7 percent overhead. Nothing magic that anybody else has done. It is the competition that exists within that lottery that causes it to happen.

Now I want to talk about a very successful program, and unfortunately, it is not occurring in the state of Texas. It is occurring in North Carolina. It is occurring in South Carolina. And it is beginning to occur in Alabama. It is about remembering your customers when you talk about technical education.

All of us know one thing, and every economist in the country knows one thing — no business, no state, no nation has more than three things to sell. You either sell natural resources, you sell capital re-

sources, or you sell human resources. That's it. There's nothing else. And Texas, certainly, to a larger extent than most, and the United States as well, has been blessed with abundant natural resources that has done us proud. That's not going to be the future. It's not going to be the future of Texas unless we find a use for mesquite wood that is not readily apparent. It's not going to be true in other parts of the country. And capital resources, certainly, are dependent on the other two, and that leaves you with one thing to sell. That leaves you with human resources.

Human resources only becomes a good economy when you are able to produce the skilled laborers necessary, and competitively, in order to do it. We just finished in the legislature, at the governor's request, a 30 year study of Texas, looking at everything bad, everything good and how you maximize it. We interviewed hundreds of businesses that have looked at Texas and had come, and some that have looked at Texas and gone somewhere else. And the huge plurality of those businesses that chose not to locate in Texas, located in the North Carolina, South Carolina or Alabama triangle. So we are saying, "what's the problem?" And when we went there, we found out the reason. That what the businessman or woman finds when they go to North Carolina is they don't have to be worried so much about chemical engineers in chemical plants. Now, we do a fine job in this country educating degreed people. What they're concerned about is technicians, the chemical analysts that they can't find at Dow Chemicals in Freeport, that they can't find in Motorola, and they can't find in places in this country. But when they show up on the doorstep of the Triangle down there, what they are asked is how many employees do you have and how many do you want? Send them to us and our community college system and we will educate them to your specification, using your curriculum guides and we'll guarantee them at the end of that process. And that's when they bring the customers.

What do some of us do? I know what we did last year. We trained 6,552 cosmetologists when we needed 650. We're training people to be things that we know when they start the program don't have a cut dog's chance of getting a job at the end of that program. And that is what has to change. There are many of our community college systems and many of yours that are doing good jobs. There are many private agencies doing the same thing. Our Texas State technical colleges are moving in that direction. But there are too many that are not. There are too many that are spending hundreds of millions and billions of dollars because they don't remember who the customers are. And I don't want North Carolina and South Carolina and Alabama to get away with this very much longer. And neither should you. Because the future of what we have to be about is high skills labor. It's the manufacturing base that we lost.

We think we have somewhat of an advantage because we think we have an opportunity particularly in this city, of being the high skill labor side of low skills that occurred in Mexico. God has been very good to Texas. I mean when He first made sure we were all over a whole bunch of natural gas, and then He made sure about the time that started playing out we were located right between Montreal and Tierra del Fuego. So we have a little bit of an advantage. But human resources are going to be the economic future of not just Texas, but the United States. And those kinds of people who are responsible for training the surgeons are what we have to be about. And all it is really is one simple premise. They remember who the customers are. Their customers are not the community college, their customers in some cases, are not even the students. Their customers are the businesses, and when you satisfy the businesses, then the students become satisfied as well. And that is all reinventing government or whatever the heck you want to call it, is all about. Thank you for giving me a chance to do this. ■

NATIONAL LEADERSHIP SUMMIT ON ECONOMIC GROWTH
APRIL 1994
SAN ANTONIO, TEXAS



HONORABLE GEORGE MCGOVERN

As a small business owner, former U.S. Senator and Presidential candidate George McGovern realized the damaging effect that excessive government regulation and the growth of frivolous lawsuits have on business. He speaks of the need to implement a cost/benefit analysis of government regulations to see if the good the regulation accomplishes is equal to the burden and difficulty it causes for small business owners. McGovern also gives examples of the drain that fraudulent and frivolous lawsuits have on the resources of businesses. McGovern believes that only in the

states will real tort reform occur, which will reduce the explosion of civil suits that have damaged not only our economy, but also the "civility and decency of our society."

Thank you, Ladies and Gentlemen. I am proud to be the guest of the American Legislative Exchange Council, and glad that the meeting is here in San Antonio. I think until you have become thoroughly familiar with the operation of a state legislature, you really don't understand American politics. I've always regretted that I did not have that experience before I went to the Congress.

I apologize for showing up with one arm in a sling. I was hurrying down the street in Washington during an ice storm to see a movie, *Schindler's List*, and noticed as I got near the theater that there were probably four or five hundred people waiting to get in the theater. All that did was to ensure that 500 people saw me fall flat on my face when I hit a spot of ice in front of the theater. I managed to dislocate a shoulder. What I didn't know until six weeks later, when it did not seem to heal properly is that I also ripped the rotator cuff. I thought that people like Sam Bruneil were the only people that had rotator cuffs. He was trying to steal my thunder earlier in the night by saying that he tore both of his playing for the Denver Broncos and that it is still not quite right. My doctor told me the same thing. I said, "Does it mean I can't pitch for the Baltimore Orioles?" He said, "Well, I wouldn't go that far. I've seen their pitching staff."

I have an old conservative Republican friend who lives next door to me in Washington. He asked me which arm I hurt and I said it was the left arm. He said, "You know, McGovern, you can't even fall to the right."

But, what I have to say tonight is neither left nor right. To tell you the truth, I have never been very comfortable with either of those labels. I think they're too sweeping and all-inclusive. The press loves to put us politicians in pigeonholes and you're supposed to stay there in a certain category, so it is uncomfortable for me. I'd like to just talk here tonight as an American. I grew up in South Dakota during the Depression and World War II. I suppose you could say that we're more or less a conservative state with views not dissimilar to that of Texas. My parents happened to be lifelong Republicans. My father was a conservative Methodist minister and I was actually born in a parsonage, and they believed very strongly in the tradition of conservatism. Whether they would have voted for me in 1972 I'll never know, but I know it would have been a hard call.

There actually are two great political traditions, as all here know American politics that go back as far as Jefferson and Hamilton. The tradition of conservatism on one hand, and liberalism on the other. In

my view, perfectly respectable traditions, both intellectually sound, both morally grounded, and I think we need those two traditions. It is actually the creative tension between conservatism on one hand and liberalism on the other that is the real genius of American politics.

Most people embrace some elements of both of these traditions. I would like to point out here the earlier remarks of Representative Harold Brubaker, because he was really spelling out some of the greatest strengths of the conservative movement, which are its resistance to government that goes beyond what is necessary, a respect for personal freedom and personal initiative. Those are perfectly valid values for any politician or any American. On the other hand, we need a liberal tradition. Liberals, for better or for worse, tend to be more innovative, perhaps more experimental, more willing to use the power of government to accomplish certain purposes. And I think it is fair to say, and I don't believe this is a partisan judgment, that most of the public programs that are now generally accepted by both political parties began as liberal initiatives, sometimes over conservative opposition, whether you're talking about social security or Medicare or rural electrification or civil rights or the women's movement, or whatever. Most of those things began as liberal initiatives and we need that kind of newness and innovations in American politics as a companion to conservatism.

That said, I'd like to talk about the topic tonight, tort reform. Some years ago after leaving the Senate, I permitted an old friend of mine, who had been in the hotel business all his life, to convince me that I should take over a hotel in southern Connecticut where he had worked for many years. Since I had been out on the lecture circuit for a while and had earned a little money, the idea was that I would provide the money to acquire what he said was a "sure fire" investment. He would be the manager since I didn't know anything about the hotel and restaurant business. Well, to make a long story short, it didn't work out too well. I'm no longer in the hotel business. But I learned a lot of things in the two and a half to three years I was involved in that hotel.

I wish I had acquired, before I became a U.S. senator and certainly before I ran for the presidency of the U.S., an appreciation of the problems small business people have to put up with everyday of their lives. It's a very difficult thing to run a small business, even in a great country like the United States, and make it pay. And there are millions of people across this country whose livelihoods are dependent on the success of small businesses. That's where the new jobs come from for the most part. That's where the existing jobs are concentrated. And I discovered in the short time that I was in the hotel business, that these small businesses are beset with reporting requirements and complicated regulations and difficult tax forms and lawsuits, both frivolous and fraudulent, and all kinds of difficulty. This experienced old manager of mine was qualified, but he had to spend so much of his time trying to stay in compliance with all the regulations, state, local and federal, that there was no time to promote that hotel, no time for an advertising layout, or working with the customers in the community. He was burning the midnight oil just trying to keep us in compliance.

And I began looking at those regulations from the perspective of somebody who was on the receiving end. And I do not want to belabor the point tonight — I haven't abandoned the liberalism and its basic essence, its basic philosophy — but I have concluded that if I were back in the Congress today, or in the White House, I would examine every new proposal against the test of whether or not the good that the proposal accomplishes is equal to the aggravation and hardships and difficulties that it presents to American business. Because there's just no question in my mind that we are damaging our competitive position. We are making it more difficult for business to function successfully because of excessive and difficult regulations.

Now, one of the problems that I experienced as I mentioned to you, and I was only in this business for two and a half years, is that we underwent two lawsuits I thought were just off the wall. The first one was from the man who left a rather large commodious bar lounge connected with this hotel. It was the only thing that made any money. And it was well run, but he left the bar one night and went out into a

large parking lot around the hotel and managed to get into a fight with somebody. He fell down and hit his head on the ground. It's even worse than a shoulder. Anyway, we had a large lawsuit on our hands. He claimed that he was attacked by somebody out there. We never found out who the attacker was, but the argument was that we should have had more security so that when you leave the bar nothing happens to you. You get in your car and go home. We had a security man on duty out there, but a little hotel like that can't afford to bring the Marines in every night. I didn't think this incident was the hotel's fault. No one else familiar with the details thought it would cause us to go into an expensive lawsuit. Eventually, the charge was thrown out, but not until we had exhausted a lot of money in legal fees and a lot of time and anxiety that could have been better spent running that hotel.

A few months later, a lady was leaving this bar and tripped for reasons unknown to me or anybody else, and sprained a knee. Another lawsuit against the hotel. Again, one that we eventually won but not until after considerable expense to the hotel.

My view of all of this is that there are some things that happen that aren't the fault of the business where they happen. They may not be anybody's fault, it's just an accident. I suppose I could have sued the theater in Washington where I fell because there was ice on the sidewalk. It never occurred to me. I just figured I slipped and fell down. But there is a growing sentiment, I think, among both private citizens and among the lawyers to move to the courts every time an accident or something unfortunate happens. It is somebody's fault, and therefore, you go to court. And if that process continues, I think we're in great difficulty as an economy and as a society.

We have a great civil justice system in the United States. Nobody wants to weaken that certainly. Nobody wants to deny a legitimate claimant his or her right to go to court to make a legitimate claim. But if we are to preserve that civil justice system we have to avoid some of the abuses that have not only crept into the system, but seemed to have almost galloped into the system the last fifteen or twenty years. And those problems include frivolous lawsuits and fraudulent lawsuits.

I came across one statistic the other day at a recent meeting of the American Board of Trial Advocates. The participants in that large conference came to the conclusion that a fourth of all the filed lawsuits in the U.S. are either frivolous or fraudulent. A 1990 Harvard study, for example, of medical injury and malpractice litigation found that 80% of the participants in medical malpractice suits, suffered no real injury or jeopardy of any kind.

There is a case here recently where a young woman at Brown University, one of the coeds, was taking a shower with a young man, hopefully her boyfriend. In the course of this shower, she cut her arm on a broken glass soap tray. She sued the university, for \$700,000. The dormitory janitor testified under oath that she had cleaned that shower just a minute before it was used and there was nothing wrong with the soap tray. In any event, the jury rejected the case, rejected the claim and came out in favor of the university. But the university spent tens of thousands of dollars in legal fees, and more than a hundred hours of effort on the part of their own legal counsel. They finally won, but this type of thing is growing on campuses all over the country, lawsuits that are being filed by students for any kind of an accident that occurs in the dormitory or on the campus.

We all know the growth of these lawsuits in the health field, and what is happening is that we're driving up the cost of just about everything. But beyond that, we are discouraging companies from producing innovative new products for fear they'll result in lawsuits. We're discouraging doctors from performing what used to be routine procedures in delivering a child. We're discouraging many physicians from undertaking high risk cases at all. They just won't do it anymore. We're encouraging doctors, perhaps, to take excessive precautions or to abandon procedures that might otherwise relieve somebody from a health problem, if not death.

And all across the board, whether it is the automobile industry or the aviation industry, the excessive growth of lawsuits has brought about a discouragement of the kind of innovation and new procedures and new techniques that might benefit us all. Plus making it increasingly difficult for even once favored firms, like those in the aviation industry to compete with the firms of other countries.

I was not aware, until I began looking into this matter, of the number of fraudulent lawsuits that are growing in number and cost in this country. One practice is when a public transit car has an accident, people run to jump on the car and claim that they were part of those suffering from whiplash and other difficulties. Recently in the state of New Jersey, law enforcement people conducted a sting operation on those transit accidents and now have all kinds of film of supposedly respectable citizens rushing aboard a car that had an accident to try to claim fraudulent fees. And here again, a surprising percentage of these awards have been demonstrated to be fraudulent.

So what I would appeal for here tonight is the recognition that this is a serious problem for all Americans. And that it does affect our economy. It does affect our competitiveness and beyond that, I think it affects the civility and decency of our society. If we began looking at each other from the perspective of plaintiffs and defendants, and begin this divisive procedure of trying to hold somebody accountable for every unpleasant thing that happens in our life, this new emphasis on the victims of society, the growth of the crybaby industry in this country, then I think it results in a loss of decency and fairness and dignity in our country that we can ill afford.

So, what can be done? One possibility is self reform led by the American Bar Association. I don't think that's going to happen. I am not a lawyer, and I respect those who are, but I don't really think that route is very hopeful.

Another possibility is for the Congress to take on this question. I am told by people who have followed this issue for years, that's not very hopeful. Either on the House Judiciary Committee or the Senate Judiciary Committee.

A third possibility is tort reform in the states. And to me, that's really the only practical and hopeful alternative that is available. Now, if that's going to succeed, it's going to take an informed and concerned American public. You don't get much reform in the United States without genuine public understanding and concern of whatever the issue is. I believe this is a story, that if properly told, the American people would respond to. It does not make any difference whether they are liberals or conservatives. If they see the problem for what it is, a threat to our economy, a threat to the civil basis of our society, I think this is an issue that can be solved. I think that state legislators not only are in the forefront of this issue, but that's where they must remain. Because it is true, the reform of the tort system at the state level is where we have our best hope of success.

So, you state legislators and informed business and professional people who are here tonight, I just want to say, regard it as a privilege to be among this group of concerned individuals. I think that we have to work together in the search for a civil justice system that is both just and civil. And that means tort reform at the state level. Thank you very much. ■

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ROY INNIS
CHAIRMAN
CONGRESS OF RACIAL EQUALITY

Roy Innis, Founder and Chairman of the Congress of Racial Equality (CORE), speaks candidly about the hypocrisy in the criminal justice system. Innis uses his own experience in New York City to show the unwillingness of those in the courts to truthfully confront the issue of crime. He expresses that the leniency given to repeat offenders and the hypocrisy of gun control are the results of a "neo-bolshevik" culture in

America that does not truthfully or logically deal with the problems of our society. He cites several examples of gun control advocates that have permits to carry the same guns they are trying to "get off the streets." Innis states that we must reject those that offer senseless solutions, and that those in the media, in academia and in politics must make a greater commitment to "truth, logic and courage."

At this time in American history, let us consider that we have defeated, recalling Ronald Reagan, "that evil empire," the great Soviet empire without firing a shot. We've solved one of the most vexing of social problems here domestically, and that is the racial problem in its worst form. That is, pre-1950s and 60s, what I call the pre-Civil Rights revolutionary period. We should be happy. We should be well on the way to maximizing the effects of these two great victories, but we are not. Because while we defeated the Bolsheviks, the Communists abroad, I am not completely certain that we have made enough headway domestically. This domestic variety I call neo-Bolsheviks.

Let me delve for a brief second into a little history. You remember the Russian revolution when the Russian people overthrew the yoke of the Czar. Most of the Bolshevik leaders, Lenin and many of the others, were in Switzerland. And when they got to Russia, after the revolution was well on its way, the Bolsheviks pulled a coup. And there was no communist revolution in Russia, that was a Bolshevik's coup. Now I said this to you because I want you to observe a similarity in style, and the root of many of the problems we'll talk about here today.

The great Civil Rights Revolution of the 1950s and 60s was a great event in America. It is one of the greatest and most successful social revolutions in the history of all mankind. In fact, one of the few real successful ones. And for that, all of us, Blacks, Whites, Hispanics, people of Asiatic ancestry, should be proud. We should not be at each other's throats, because we have gotten rid of a very nasty social arrangement. But in the process of doing that, I think we, during the Civil Rights movement, maybe did the job too well. Because we so sensitized America to the evils of the past, and that is good. That is decent. But the American people have become over-sensitive, hyper-sensitive to racial questions. So that whenever a question of race impacts upon a solution, you can almost be certain that the solution is going to be polluted and confused and contorted. And that is a problem of development in the urban centers in general, and the central cities, these so-called ghettos, in particular. To come upon that problem, which is an expression of the decency of the American people, the fact that they are so sensitive and want to undo the record of the past, the hustlers have become aware of it. The racial racketeers, and they come in all colors, many of them come out of that Bolshevik culture. They are in fact, the neo-Bolsheviks.

And where do you find them? You find them in media, you find them in academia, and yes, even in politics. Many of your colleagues in state legislatures and city councils and county commissions. And in Congress, of course. This hypersensitivity is a decent expression of the American people about a sorry error, which is known as the McCarthy era. We are so sensitive that even when you see a neo-Bolshevik, even when they talk, walk and squawk like a Bolshevik, you can't call them a Bolshevik. Because he is an American.

I am here to say to you that if we are to save America, we are going to have to not become insensitive to racial questions, and insensitive to questions like the unfairness of McCarthyism, but we have to have a greater commitment to telling the truth. A greater commitment to what I call the TLC principle, that is truth, logic and courage.

The problem of crime and violence cannot be dealt with unless we take this approach. The reason for much of the crime and violence is that it is encouraged by the apologies and the alibis for criminals. And these apologies and alibis are being acquiesced by the rest of us. You cannot deal with the crime and the criminals unless you are prepared to confront it.

One of the great causes of crime is the fact that crime does pay. I once went to trial for catching the criminal who had broken into my car. Unfortunately for me, he resisted a citizen's arrest. I turned him over to the police and within 48 hours I was under arrest. I was asked to be in a line up and I refused to go to a line up. I agreed to stipulate that I was there, I caught the SOB. I don't need a line up for that. I gave him to you, that's the lot. I went to the appellate court and I had to go into a line up like a common criminal. I went on trial for three and a half weeks, on two counts of very serious assault. The system was very vigorous in this case. I won my case, but it left a very bitter taste in my mouth.

The criminal, first of all, was testifying against me. Naturally, he was dressed in a nice blue suit and he was dried out for maybe a couple of weeks. He was referred to as "this family man," and if you check the New York City Supreme Court records, you will see it. This family man while plying his trade, was set upon brutally by Mister Innis. I couldn't believe my own ears. In a short break during the trial I asked some of my colleagues if I was hearing right. Did the prosecutor call, in fact, the bureau chief of the criminal division in Manhattan, did this man actually call this common criminal, who has had 20 arrests before he ran into me, a "family man"? A few days after he came out of the hospital, he was arrested again, this time by the police at Yankee stadium. He didn't come back to my area, which is part of the solution.

I went every time there was a court date for this fellow for the second arrest. I had my people there and I went myself. Then, one time we missed and the case was dismissed. To keep him pristine pure from the trial of Jesse James John Dillinger Innis.

That kind of attitude was so wrong, so conspiratorial with its indecency. The young man stated, when he was asked how many crimes he had committed "for each of the arrests you've had, how many crimes have you committed when you were not caught?" And he boldly stated "fifty." In other words, you can assume he did something like a thousand crimes for which he was caught only 22 times. That gives this guy one hell of a batting average, a 98% batting average. Would you like to have him on your team? The fact is these guys don't have to worry, because of the 22 arrests, he did not go to jail very many times. And he did not stay there very long.

But what is more damaging is the fact that there is a veritable reign of terror, intellectually and physically, in many of the central cities. Now, it started in the black community, in the Hispanic community, but it's spreading throughout all our cities, throughout our urban areas. And the reason is that increasingly, there are silly solutions being offered by these Bolsheviks to crime, such as gun control. And when these people get on their horse, they lose sight of all logic.

The TLC principle of truth, logic and courage, is completely lost. For instance, the two cities with the toughest gun laws, New York City and Washington, D.C., are the places that you have more fear for your life. The places where the criminals are more safe from us. The people who are murdered are the decent people, because they are the ones who are unarmed.

And let me show you how this thing proliferates. And how this whole lack of logic and honesty and courage detracts from this problem. There's a fellow that's running around the country right now named is Fernando Mateo. He is the new superstar of the media set, a pure media creation. He has a big campaign to give gifts for guns and some very nice, hypersensitive old ladies in New York and other parts of the country, went along with this gimmick, giving their guns up for a gift. Certain stores and corporations joined this fuss. Only one problem. Not one criminal has given up his gun for a gift. He uses his guns to get all the gifts he needs.

This shows you the hypocrisy of this gun solution, and this goes beyond Fernando alone, but to the media establishment and these anti-gun politicians. New York City, with its gun law, has allowed only about twenty-six thousand carry permits. And, of course, most of those permits are in the hands of people like Donald Trump, a man who fears for his life with a chauffeur and a bodyguard. The publisher of the New York Times, the greatest anti-gun newspaper in the world, has a full carry permit, for fear of his life. And, people of that sort and this fellow Fernando Mateo, who is running around and getting senior citizens to disarm themselves, has a full carry permit. I want to ask Fernando, how can you ask people to give up their guns and you have yours? Fernando says, "I tell you the truth. My gun saves lives." But listen to the hypocrisy, and listen to the lack of logic. The fact that he knows and won't tell you that his gun has saved a life. His life, I suppose. He does not extrapolate his need for gun, the efficacy of a gun in his hand, to the greater efficacy of the gun in the hand of a defenseless senior citizen.

And it is that kind of bolshevik, and his hypocritical thinking, that is the root cause of crime. If you check with the media establishment, you will find that almost every one of those media pretty boys carries a gun.

There was a journalist in Washington D.C., Carl Rowan, a black journalist, one of the great anti-gun journalist of all time. Two young white kids slipped into his swimming pool to skinny dip, and for that crime, pistol-packing Carl Rowan came out and shot the kid. In Washington, D.C.

I have combined my efforts with the NRA, I stand with them at this time when they are being attacked by all sources. I heard Henry Waxman just five minutes ago equate the NRA with the tobacco monopoly. One of the bad guys. I heard in a newscast, to show this neo-bolshevik thinking, in which they were talking about today being the anniversary of the great, great Jimmy Doolittle and the fire bombing of Tokyo. Great moment in American history. Guess what the media bolshevik said. The "infamous greed of Jimmy Doolittle." Thank you. ■

NATIONAL LEADERSHIP SUMMIT ON ECONOMIC GROWTH
APRIL 1994
SAN ANTONIO, TEXAS



HONORABLE JOE BARTON
U.S. HOUSE OF REPRESENTATIVES

The telecommunications revolution we are experiencing, and how that revolution has drastically changed the way in which we communicate, was the subject of the address given by Congressman Joe Barton. Barton points out the unequalled progress we have made in the past ten years, such as the invention of the cellular telephone, the explosion in data processing capabilities and satellite communications. He explained what Congress has been doing in telecommunications policy, both the mistakes and the successes. Barton believes that the marketplace should decide the price and quality of the new technological capabilities which will be offered in the future, but that Congress and state government must work together for that to happen.

I have been asked to speak a little bit about telecommunications policy. I am on the Energy and Commerce committee, I am on the Telecommunications Finance subcommittee, I am an engineer and I have worked in the past for telecommunications companies, and so, I'm going to do that. But I have to state right up front that our next speaker is the president of Southwestern Bell and she made the mistake of showing me a copy, actually faxing me a copy of the outline of her speech. Now, if I were a typical politician, I'd take her speech, give it and take credit for it. But I'm not going to do that because she is much more knowledgeable than I am on the details. So what I want to do is just give those of you here from the various state legislatures an overview of where we are going on telecommunications policy in Washington. And I will impose a point of personal privilege by giving you some of my personal perspectives on where we need to go, which is not necessarily the same as where the Congress is going.

In general, I think that when we talk about telecommunications policy, we really are talking about two different aspects of telecommunications. One is personal, the telephones that we use in our homes, or the communicated private conversations with our families and our friends. Cable television, perhaps, that comes into our homes for entertainment purposes. That kind of traditional Ma Bell reach-out and touch someone mentality. And even in that area, even in personal communications, telecommunications systems and the ability to communicate not just across the street or across town or across the state, but literally across the world, is changing very rapidly.

And obviously, the second aspect would be in business. Now when you talk about telecommunications policy in a business perspective, you're talking about the ability to transmit large amounts of data, to communicate and coordinate marketing strategies and production strategies across, again not just the local area but, literally, the world. And while there are elements in telecommunications policy that are mutually inclusive in each of those areas, obviously there are things that are more important in one area than in the other.

Now, in both areas, we are experiencing a revolution, a revolution as compared to even 10 years ago. How many people today in this room have a cellular telephone? It's a legitimate expense in Congress, so every Congressman has one. And it's probably a legitimate expense for each state representative and state senator. How many of those that raised your hands had a cellular telephone ten years ago? You probably had a mobile radio phone, but you could not have had a cellular phone because it hadn't

come to the market ten years ago. The kind of technology that we know today was not yet available ten years ago. How many of you have a beeper or a pager? I have one. We don't have any doctors or drug dealers in the room then, because they would. How many of you have cable television in your home? That's all part of the revolution. How many of you have a personal computer in your office? How many of you have a modem in your office so that you can communicate with other computers that are not in your office? How many of you are hooked up to Internet or some sort of national information network system?

We had a Republican Congressional retreat about three months ago, there's 176 Republicans in the House of Representatives, and about 110 came to the retreat. You know how many Republican Congressmen were hooked up outside of their own congressional offices to Internet or something like that? One. You're looking at him. So, we're only about fifteen years behind the curve in the Congress, which may mean we're making up ground. Well, I just used those as examples to make a point, because you tend to think we've always had a telephone. Now, Alexander Graham Bell invented the telephone in the late 1800s, so we've always had telephones. In my generation, I was born in 1949, we've always had televisions. But if you just look at the way things are today as compared to even ten years ago, the revolution on the business side is amazing.

A man named George Gilder, a noted author who wrote "Wealth and Poverty," which was one of the books that fueled the Reagan Renaissance in the 1980s, spoke at a conference several weeks ago that I attended. He pointed out that with the fiber optics technology available today, you can communicate literally around the world in trillions of bits a second. I am speaking at about fifty five bits a second. Most people communicate in the South, I guess we communicate a bit slower, at forty bits a second, and in the North, seventy-five bits a second. But average humans speak at fifty-five bits a second of data. As a Congressman I listen at about twenty-six bits a second. I understand about ten bits a second, unless it is a committee hearing in which it drops down to the square of that, or about three and a half bits a second. And those of you who have testified before Congress can relate to that because most of us on the side of the podium that I am on, tend to be asleep or reading the newspapers or communicating on our cellular telephones, now that we have cellular telephones.

But, the ability to communicate is expanding exponentially. There is technology available today in the marketplace, the radio transmission where you don't have to have a specified frequency, that you literally have transmitters and receivers that look at what's available in the spectrum and that's where they send it. That's where it goes out and that's where it is received. So, you don't even need to have the regulations like we have on the books today where you allocate for KRLD Radio in Dallas or WBAP in Fort Worth in a specific spectrum. You can literally communicate in that arena as if it is a total commodity and there is no scarcity. That technology is available today. The ability to communicate in massive amounts of data to literally anywhere in the world with wireless transmissions is a bonus.

One of the things that's going to be investigated, for example, in the tragic shooting down of the two helicopters yesterday in the no-fly zone over Iraq by American F-15 fighter pilots, is what went wrong with the telecommunications line. We have got military satellites that can locate all our military assets within a classified geographic area that are extremely small. I can't tell you how small, but it is much smaller than this room. And there is an AWACS plane at 35,000 feet and there are the F-15s at 10,000 and there are the helicopters at a thousand feet on a clear day in the morning where everybody is speaking English on the same frequency. Something went wrong with the communications line, because there is no way if they have all those systems working that those two helicopters should have been shot down. And that's because we have this huge ability to interplay by communications anywhere in the world.

But what are we doing in Washington legislatively that is going to impact on the state level? One of the things that we did last year that I think was a mistake was to re-regulate cable. And that was a purely

political decision because the majority party in the House and the Senate wanted to embarrass the President and try to create a campaign issue. The majority party made a lot of promises about regulations that would benefit consumers, and we didn't. We were not strong enough. Those of us who held the alternative position felt that we could prevail. The result was for a third of the cable rate payers, rates went up, it didn't go down. And for those that didn't go down, they were transferred bottom line. Very few rates went down and the market took a real hit. And it has impacted some of the emerging mergers between telephone companies and cable companies and media companies, some of those mergers have been called off and it just sets back the transition to marketplace even further. So, I think what we did last year was a mistake. Admittedly, I was in the minority side of that, but I think we will undo it.

This year, we're working on a more positive note. There are two bills in the House and there's one bill in the Senate. In the House it is the Brooks/Dingell bill, which allows the RBOCs, (and that's not a brand of tennis shoes, RBOCs is short for regional bill operating companies), to get into manufacturing and telecommunications equipment and subject to state approval, to get into long distance market intrastate and also allows competition intrastate, intralata. Now, I could give you a quick quiz on what a lata is. And I wouldn't have been able to answer that question two years ago, but being an aging yuppie and working for two years, I know what a lata is. It is a local access transport area, and it's a little bit like an area code, although not exactly like an area code.

And one of the things that we're going to do is allow intralata competition. Wherever you live there is probably only one telephone company that can transfer telephone calls. It might be an RBOC, it might be an independent telephone company, it might be a GTE, or a Contel, but there is normally only one telephone company. What we're trying to do is open up that area to competition, so one of the things that U.S. state regulators are going to have to do is determine whether that's a good thing. Because there are currently only two states, Alaska is one, and I think Connecticut may be the other, that allow competition intrastate and intralata. Now, there are eight states, Michigan is one, that are looking at it. Under Brooks-Dingell and Markey-Field, which is a companion bill, we say that there can be competition if the state approves it. If the state law does not prohibit it. So that's one of the things that state legislators are going to get involved in.

We're also changing the definition of universal service in market fields. Now, when we passed the Telecommunications Act in 1934, and believe it or not, that's the last time the federal government passed a major comprehensive bill on telecommunications policy, there was a goal stipulated for universal access for telephone service. And through a very complicated series of subsidies and cost shifts, about 94% of the country has access to telephone service. Interestingly enough, about 98% of the country has television sets. And there has been absolutely no government effort at all to make sure that every American had a television set, which is a kind of an interesting statistic. But universal service as it is defined today, is simply "dial tone." You pick up the phone, you get a little tone and then you can dial the telephone. Or actually, you don't dial it anymore unless you're in a rural area.

But there are members of Congress that think that universal service ought to include a lot more than dial tones. It ought to have some of these network capabilities, these electronic publishing capabilities, whether you want it or not. Now, that's an issue that your state legislatures are going to have to deal with. In my case, my family is a very low tech family. I have worked hard to get my wife, Janet, to accept the concept of the cordless telephone. I have given her for Christmas a cordless telephone which did not exactly endear me to her as a romantic gift. But, she finally accepted that the telephone didn't have to be on a cord. But she keeps the cordless telephone on the cradle and does not take it anywhere else in the home. So, when the phone rings she has to walk into the bedroom to pick up the cordless telephone. That same station has an answering machine capability. My wife refuses to use the answering machine capability.

She sees no need for it, so one of the things that we've got to do in this information revolution is make sure that what we provide, or what we mandate, is something that the people really want. When my wife tells me she really wants a cordless telephone and she really wants answering machine capability, I may consider initiating federal legislation to require it. But until that time, I think we ought to let the marketplace operate.

But where are we? The Markey-Field's bill and the Dingell-Brooks' bill have passed the relevant committees, the Energy and Commerce committee and the Judiciary Committee, and are waiting for activity. They're doing what is called report language right now, and all you folks are very familiar with what report language is. That's where you put in the stuff that you were not bold enough to put in the legislation itself, but you still want it in so you put in report language and hope that nobody notices it and opposes it. In the Senate there's going to be a lot of negotiations between the majority leader and the minority leader, and the relevant committee chairman and ranking minority members, to bring the Hollings or the Danforth bill up in the Senate. But because this is such an important issue, I think that it will move this year.

Again, to go back to my original thesis: We're in a revolution. In the legislatures, at least at the federal level, we simply can't comprehend the capability the marketplace has to offer. And my guess is, at the state level, unless you're a state senator or state representative who has really studied this issue for a number of years and really have a personal interest in it, you probably don't have a grasp of all the capabilities that are out there and all the changes that are being made. And I will predict that within ten years we do have this information superhighway and we do have this seamless communication system. I will predict that you, in your own home, will be able to choose both local competition for who transfers your local telephone calls and you will be able to order all these various services by telephone or through the TV set. You will have a number of people that will provide this information and this communication capability to you and that the market place will dictate the price and the quality of the service. But in order for that to happen, both the federal government and the state governments are going to have to really work together. I don't think the federal government ought to tell the states how to run things. I think we, at the federal level, ought to set the ground rules for interstate commerce and if there needs to be technical standards, if we have to have spectrum allocation, if we have to have some sort of a federal regulation on transmitters and receivers and international data uplinks, then, fine. But there is absolutely no reason for anybody on the telecommunications and finance subcommittee in Washington, D.C. to tell a state representative in Austin Texas, or in Oklahoma City, Oklahoma or Sacramento, California, what to do within your state, and especially when you have your PUCs (Public Utility Commissions) that are involved in all of that.

So, I would have to say that I think we're moving that way. John Dingell, Jack Brooks in the House and Mr. Hollings over in the Senate, Vice President Gore, appear to be realizing that markets do work and that regulation while sometimes necessary, is not as necessary as it was in the past, if you can have a real market competition situation. Thank you for letting me be a part of your conference. ■



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