SJR

12

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 3/3/05

FURTHER:

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: _____

Judiciary Committee considered SENATE JOIN RESOLUTION NO. 12

SJR 12 URGE CONFIRM US SUPREME COURT NOMINEES

Requesting the United States Senate to move quickly to confirm all nominations by President George W. Bush to the United States Supreme Court.

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

Senate Bill:
[ ] Same Title
[ ] New Title

House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
			X	
			✓	
	X			
	X			
CHAIR: Ralph Seekins	✓			

The San Diego Union-Tribune.

Confirming judges: The constitutional option

By Michael B. Rappaport and John C. McGinnis
March 11, 2005

Politicians have notoriously short memories. With Democrats still retaining enough votes to filibuster President Bush's judicial nominees, many Republicans seek to weaken or eliminate the ability of senators to mount judicial filibusters. Under existing Senate rules, however, a proposal to change the filibuster rule can itself be filibustered and this filibuster ended only with a two-thirds vote of the Senate.

Republicans therefore favor using majority rule to change the filibuster rule, but Democrats contend that this would be improper and perhaps unconstitutional. By labeling such a change "the nuclear option," Republicans appear to concede that any majoritarian amendment would be an unprecedented threat to the harmony of the Senate.

Both Republicans and Democrats forget, however, that the existing filibuster rule itself was a product of a process very much like the so called "nuclear option." Moreover, whatever one thinks of the desirability of the filibuster rule, the structure and history of the Constitution confirm the majority's right to amend the rule.

The existing filibuster rule was enacted at the beginning of the congressional session in 1975. At that time, Sen. Walter Mondale, D-Minn., and James Pearson, R-Kan., proposed to change the old filibuster rule to permit 60 senators, rather than two-thirds of those voting, to end debate.

When this proposal was filibustered, they made a motion that debate on the amendment be ended by a mere majority. Although a senator objected that the Senate rules allowed debate to be terminated only with the approval of two-thirds of the Senate, a majority of the Senate rejected this objection. In the end, the Senate reached a compromise which enacted the present filibuster rule with its 60-vote cloture requirement, but reversed the ruling that allowed a majority to end debate on an amendment to the rules.

Thus, majority amendment of the Senate rule is not something new, but was a necessary step to enacting the existing filibuster rule, which otherwise would have been defeated by a filibuster. Moreover, liberal Democrats like Walter Mondale, D-Minn., were among the principal architects of the change. And this majority amendment was anything but nuclear, since it neither destabilized the Senate nor eliminated the filibuster. Instead, the amendment caused the Senate to negotiate a compromise that has lasted for a generation.

The Senate majority's power to modify the filibuster is also strongly supported by constitutional principles. Both the text and structure of the Constitution show that only one of three possible views about the constitutionality of the judicial filibuster is correct. The first view – advocated most recently by Senate majority leader Bill Frist, R-Tenn. – is that filibustering judges is simply unconstitutional. But the Constitution expressly gives the Senate the right to fashion its own rules of procedure and nowhere requires application of majority rule to confirmations.

The second view – advocated by many Democrats – is that a majority has no right to change the filibuster rule because the Senate rules still require a two-thirds vote to end a filibuster mounted against a resolution to change the filibuster. But this Senate rule conflicts with the structure of the Constitution.

The Constitution provides only a single method – the constitutional amendment process – to entrench a rule against repeal by a majority. If Democrats were correct that rules can be insulated from majority amendment, a bare majority in each House could have passed the Bill of Rights and made it our fundamental law by declaring that only unanimous votes by both Houses could pass legislation violating its principles. The Democratic view also conflicts with a principle known since before the framing of the Constitution that one legislature cannot bind subsequent legislatures.

The third and constitutionally correct view is that the Senate can choose to retain the filibuster rule, but that a majority must be able to change it. The Senate can thereby exercise its full constitutional authority to fashion rules of procedure but past majorities of the Senate cannot put current majorities in a procedural straitjacket. Thus, a change in the filibuster rule by a majority is not a "nuclear" option but instead the constitutional option – the route contemplated by our founding document.

Of course, the Senate majority's undoubted power to change the filibuster rule does not mean that doing so would be good policy. If modern judges feel free to amend the Constitution in the guise of interpreting it, there is a strong argument that an express supermajority confirmation rule might be beneficial. After all, through its express amendment process the Constitution requires a stringent supermajority rule before politicians can establish new norms that will bind future generations. If judging has become just politics by other means, it does seem strange to permit justices confirmed by a mere majority to start imposing their values on the rest of us.

The Republican view, however, is that judges should enforce the Constitution as understood by those who framed it. Under this more

formal view of the judicial role, the Senate does not need the hurdle of a supermajority rule, because judges are not engaged in policy-making but rather enforcing a document that was itself enacted by a supermajority.

Thus, Republicans have a legitimate, even if contestable argument, for a pure majoritarian confirmation process. What cannot be contested, however, is that the Constitution prevents the Democratic minority from blocking the Republican majority's decision to embody its principles in the rules of the Senate.

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REHNQUIST THE GREAT?

Even liberals may come to regard William Rehnquist as one of the most successful chief justices of the century

BY JEFFREY ROSEN

In his thirty-four years on the Supreme Court, William Rehnquist participated enthusiastically in the annual Christmas party for the justices and their clerks. "He and I wrote the Christmas show the year I clerked for him, in 1975," recalls Craig M. Bradley, who now teaches law at Indiana University.

One carol that year was sung to the tune of "Angels From the Realms of Glory." It went like this: "Liberals from the realm of theory should adorn our highest bench / Though to crooks they're always chary / at police misdeeds they blench." ("The word 'blench' came from Rehnquist," Bradley says. "I didn't know it meant 'blanch.'") The members of the chorus then fell to their knees and sang, "Save *Miranda*, save *Miranda*, save it from the Nixon Four." The so-called Nixon Four were Supreme Court Justices Warren Burger, Harry Blackmun, Lewis Powell, and, of course, Rehnquist.

Twenty-five years later, after having repeatedly ridiculed the constitutional soundness of the decision requiring police officers to read suspects their *Miranda* rights, Rehnquist voted to uphold it. "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture," he wrote in a 7–2 opinion for the Court in *Dickerson* v. *U.S.*, in 2000. Rehnquist's apostasy provoked one of Justice Antonin Scalia's most vitriolic dissenting opinions. Joined by Justice Clarence Thomas, Scalia declared, "Today's judgment converts *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance."

Rehnquist's evolution from *Miranda*'s leading critic to its improbable savior infuriated conservatives and confused liberals; but in fact it was emblematic of his career. Throughout his long tenure, liberals always simplistically lumped Rehnquist together with the other conservatives on the Court, whereas conservatives never fully embraced him as one of their own. Furthermore, liberals have never understood how significantly and frequently Rehnquist departed from doctrinaire conservative ideology, and conservatives have failed to grasp that his tactical flexibility was more effective than the rigid purity of Scalia and Thomas. In truth, Rehnquist carefully staked out a limbo between the right and the left and showed that it was a very good place to be. With exceptional efficiency and amiability he led a Court that put the brakes on some of the excesses of the Earl Warren era while keeping pace with the sentiments of a majority of the country—generally siding with economic conservatives and against cultural conservatives. As for judicial temperament, he was far more devoted to preserving tradition and majority rule than the generation of fire-breathing conservatives who followed him. And his administration of the Court was brilliantly if quietly effective, making him one of the most impressive chief justices of the past hundred years.

The chief justice, like each of his colleagues, has one vote; his greatest power lies in choosing who will write an opinion when he's in the majority—himself or another justice who he thinks will best reflect his views. On this score Rehnquist proved to be a master tactician, unlike his inept and pompous predecessor, Warren Burger, who infuriated his colleagues by changing his votes in order to seize the best opinions for himself and then losing his majorities. And Rehnquist's judicial philosophy also made it easier for him to reshape the Court in his own image. He was essentially a pragmatist who believed in certain core conservative values—primarily states' rights and convicting criminals—but didn't fuss too much about how he achieved his aims. In contrast, Scalia and Thomas are more concerned about ideological purity than about persuading a majority of their colleagues, which is why neither would make an effective chief.

One of Rehnquist's unique and abiding talents was for getting along with his ideological opponents. When he first joined the Court, at the age of forty-seven, he was taken under the wing of the liberal activist William O. Douglas, a fellow westerner who saw in the irreverent young conservative an incarnation of his youthful self. Rehnquist's other liberal colleagues were similarly impressed by his fairness and good nature: Thurgood Mar-

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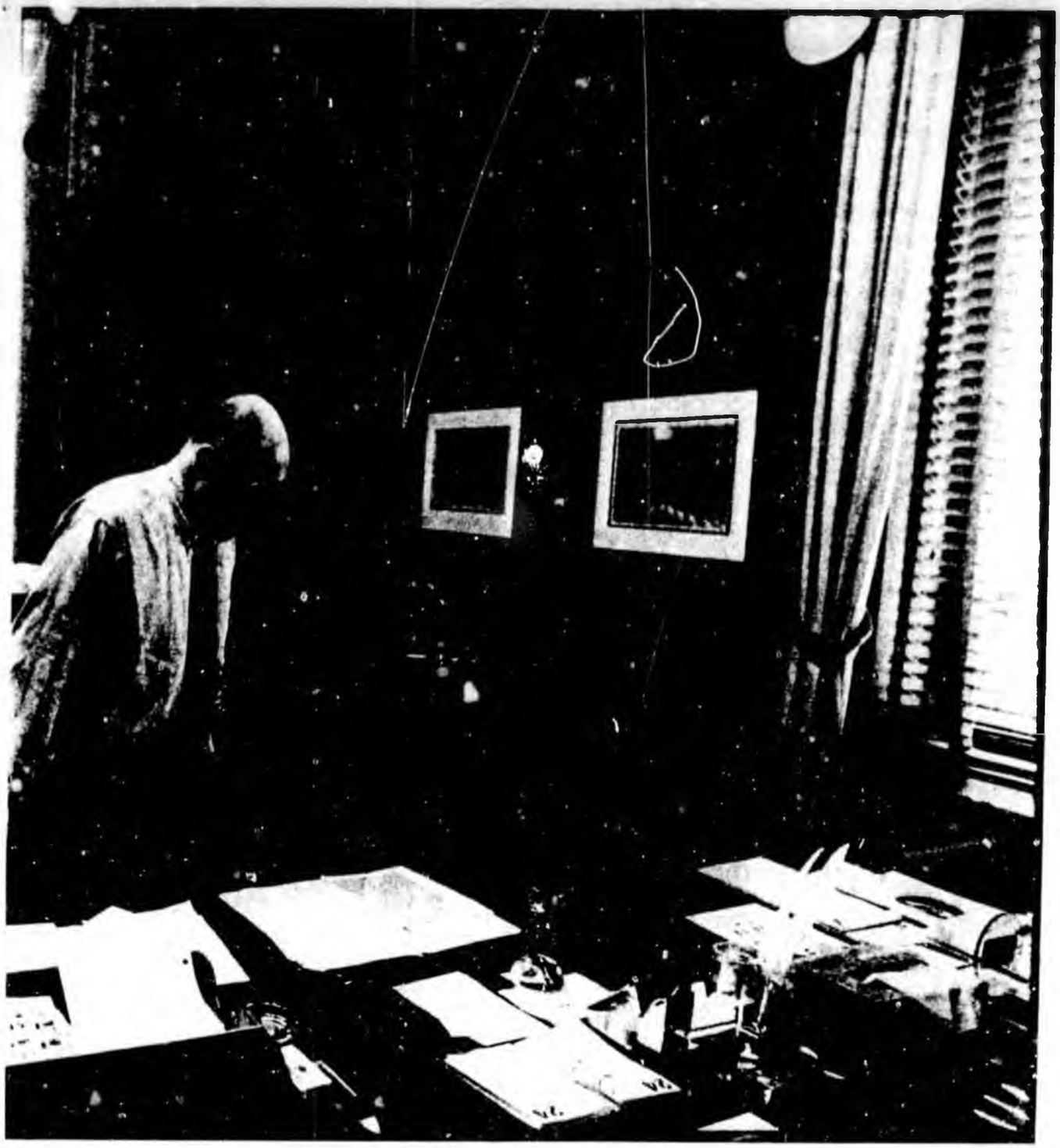
shall called Rehnquist "a great Chief Justice," and William Brennan described him as "the most all-around successful" chief he had known—including Earl Warren. On the current Court, Rehnquist has been praised frequently and effusively by Ruth Bader Ginsburg, who, despite her philosophical differences with the chief justice, admires his administrative skills so much that after the complicated campaign-finance case last term, she told clerks how happy she was that the rumors he was retiring weren't true. One former clerk remembers Rehnquist best for his sensitivity toward colleagues: "He was very concerned about hurt feelings among the justices, and he was very careful and observant of the way that certain memos or interactions would make other justices react or feel. He always avoided invective in his own memos, and smoothed over hurt feelings when other justices used it."

A hallmark of Rehnquist's rule was his unparalleled organizational skill: he got opinions out quickly and made the arguments run on time both in and out of court. When, in a rare interview last year, Charlie Rose asked him how he would most like to be remembered, Rehnquist said as a good administrator; he had tried, he said, to run "a relatively smoothly functioning Court." And he suggested that his ability to get along with a group of strong personalities reflected "a relatively passive nature," a "very high boiling point," and the ability to compromise.

DAVID HUME KENNERLY / GETTY IMAGES

Liberals have never understood how significantly and frequently Rehnquist departed from doctrinaire conservative ideology, and conservatives have failed to grasp the effectiveness of his tactical flexibility.

Certainly he was a creature of habit; his daily routine in his chambers remained the same for more than thirty years. He would arrive between 8:30 and 9:00, say hello to his two secretaries, go through his mail, and smoke a cigarette (for years he was a two-cigarettes-a-day man—no more, no less). At exactly 9:30 he would call in his clerks, gently reminding them, if they were even a minute late, that "the doctor doesn't wait for you." A trivia buff, he loved to test the mettle of his clerks at the morning meeting, asking them, for example, to name the five largest states in order of their area. He would often go to the University Club for a swim, to alleviate chronic back pain, and he usually left the office at 4:00. He was not known for taking work home with him. When he assigned the writing of an opinion to himself, he would set a deadline for the first draft ten days away and then start asking his clerks about it after a week. He was insistent that his fellow justices meet his exacting standards for punctuality, and would punish those who fell behind on their opinions (including the notoriously slow Harry Blackmun) by not assigning them new ones. And he ran an especially tight ship during the justices' private conferences, the twice weekly meetings after oral arguments, at which the justices cast their preliminary votes. Briskly going around the table, in order of seniority, to allow each justice to give his or her views, he refused to let discussion wander. Some colleagues complained that this format discouraged active debate, but



Rehnquist argued that because most of the justices had already made up their minds, a protracted colloquy would be a waste of time.

Rehnquist's courtroom style was similarly unvarying. He would cut lawyers off in mid-sentence when the red light on the bench began to flash, indicating that their allotted time had expired. (Each side gets precisely thirty minutes.) Some lawyers grumbled about this rigidity, but Rehnquist's clockwork discipline looked appealing in retrospect when Justice John Paul Stevens, who has presided in the chief ju[illegible]s place during his battle with th[illegible]roid cancer, recently let one advocate have extra time and was then compelled to grant an extension to his opponent as well.

The two chief justices Rehnquist most admired, John Marshall and Charles Evans Hughes, were both politicians who had a knack for bringing together unlike-minded colleagues: Marshall, who served from 1801 to 1835, had been a Virginia congressman and secretary of state; Hughes, who served from 1930 to 1941, had been the governor of New York, a Republican candidate for president, and secretary of state. As Rehnquist told the C-SPAN interviewer Brian Lamb in a *Booknotes* appearance in 1993, Marshall had "an ability

to get along with other people and persuade them that stood him in good stead when he was chief justice." And in a 1976 article in the *Hastings Constitutional Law Quarterly*, "Chief Justices I Never Knew," Rehnquist wrote that he especially admired Hughes's businesslike conduct of his private conferences, which lasted only six hours as opposed to the two or three days under Hughes's successor, Harlan Fiske Stone. Rehnquist concluded that "Hughes's superiority to Stone in presiding over the conference has a definite connection to their different amount of exposure to active political life."

Rehnquist's own political sensibility and experience were similarly central to his stewardship of the Court. By temperament and training he represented an older and what has come to be seen as milder strain of conservatism, rooted in the Goldwater wing of the Republican Party. Having cut his political teeth in Arizona in the heyday of Goldwaterism, he came to the Court with a far less angry and embattled attitude toward American democracy than younger conservatives like Scalia and Thomas. And unlike Scalia and Thomas, Rehnquist was never invested in fighting the culture wars from the bench, because of his overriding commitment to majority rule regardless of what the majority decides.

Unlike Scalia and Thomas, Rehnquist was never invested in fighting the culture wars from the bench, because of his overriding commitment to majority rule—regardless of what the majority decides.

If judicial activism is defined by a judge's willingness to strike down federal or state laws, then Scalia and Thomas are among the most activist justices on the Court today, surpassed only by Anthony Kennedy and, perhaps surprisingly, Sandra Day O'Connor. In contrast, Rehnquist is tied with Stephen Breyer for the role of second most restrained justice, after Ruth Bader Ginsburg. And while all the conservatives on the Rehnquist Court say for public consumption that the judiciary should occupy a modest role in American politics and should defer to the judgment of elected legislators, Rehnquist has most consistently practiced what he preaches.

"I'm a strong believer in pluralism," Rehnquist told *The New York Times Magazine* in 1985, the year before he was appointed chief justice. "Don't concentrate all the power in one place . . . You don't want all the power in the Government as opposed to the people. You don't want all the power in the Federal Government as opposed to the states." When pressed about the source of these views, he joked, "It may have something to do with my childhood."

Rehnquist's Robert Taft–style conservatism—his faith in local majorities and his suspicion of broad federal power—does indeed reflect his midwestern upbringing. Born in 1924, he was raised, along with his sister, Jean, in Shorewood, Wisconsin, an affluent Milwaukee suburb known during the Depression for its Republicanism. Rehnquist's father, the son of Swedish immigrants, was an enthusiastic Republican who had never attended college and made his living selling paper wholesale. His mother, who had majored in French at the University of Wisconsin, was fluent in five foreign languages and worked as a translator for local export businesses.

Rehnquist's early years were suffused with old-fashioned patriotism. He enthusiastically supported U.S. intervention in World War II, and in 1941 he participated in a reenactment of America's founding called United States of Young Americans. That strong strain of patriotism has been an essential part of his makeup throughout his judicial career. In 1989, when Justices Scalia and Kennedy, both First Amendment libertarians, reluctantly voted to strike down a ban on flag-burning, Rehnquist produced an emotional dissenting opinion quoting John Greenleaf Whittier's Civil War poem "Barbara Frietchie": "'Shoot, if you must, this old gray head, / But spare your country's flag,' she said." It was one of the most personally revealing dissents he ever wrote.

Rehnquist won a scholarship to Kenyon College, in Ohio, but dropped out after one quarter, having found the atmosphere intellectually frivolous. He enlisted in the Army Air Corps and spent three years as a weather observer, ending up in Morocco and Egypt (where he was photographed on horseback in front of the Sphinx). Reluctant to return to the cold Milwaukee winters ("I wanted to find someplace like North Africa to go to school"), he enrolled on the GI Bill at Stanford, where he majored in political science.

While he was in the Army Air Corps, Rehnquist encountered a book that would be crucial to the development of his judicial philosophy: Friedrich A. Hayek's *The Road to Serfdom*. "This book was an advocacy book trying to show that state planning and socialism and that sort of thing didn't work economically and were dangerous politically," Rehnquist told Brian Lamb in a later *Booknotes* interview. "It made quite an impression on me."

Rehnquist graduated Phi Beta Kappa from Stanford in 1948 with a bachelor's and a master's degree, and then got a second master's degree in political science from Harvard, in the hopes of becoming a professor of government. While at Harvard he started a thesis about the conservative British political philosopher Michael Oakeshott, whose insistence on the importance of continuity and tradition for social stability resonated strongly with Rehnquist. Oakeshott, like Hayek, called into question the centrally planned welfare state, as part of a larger warning against the concentration of power in the hands of government. But Oakeshott

resisted Hayek's effort to construct a rigid libertarian ideology as the answer to collectivism; he argued that the best way to protect limited government was with a pragmatically conservative approach to politics, rather than with abstract theories about the true nature of the state.

"The chief's conservatism seems to reflect Oakeshott more than libertarians like Hayek," observes Richard Garnett, a former clerk who now teaches law at Notre Dame, and with whom Rehnquist discussed his admiration for Oakeshott. "It's not always about swashbuckling ideological adherence to first principles. It's also about temperament and disposition, about an attachment to traditions and institutions, and about stability and regularity."

After Harvard, Rehnquist attended Stanford Law School and graduated in 1952 at the top of an impressive class that included Sandra Day O'Connor. Based on his stellar academic record and genial personality, he won a clerkship with Supreme Court Justice Robert Jackson, who had been Franklin Roosevelt's attorney general and was committed to the principle of judicial deference to legislatures. During his clerkship, which began in 1952, Rehnquist wrote two highly controversial memos to Jackson that would provoke firestorms during his own confirmation hearings, in 1971 and 1986. In the memos Rehnquist seemed to urge Jackson to dissent in two historic civil-rights cases: *Brown* v. *Board of Education*, which would strike down school segregation, and *Terry* v. *Adams*, which would block efforts to exclude blacks from the pre-primary selection of Texas Democrats. Rehnquist claimed during the hearings that he was expressing these views at Jackson's request—an assertion disputed by Jackson's secretary. Several legal scholars believe that Rehnquist probably lied in denying that the views were his. He appears to have been the only Supreme Court clerk during the 1952 term who supported *Plessy* v. *Ferguson*—this at a time when the country as a whole was evenly split over desegregation. Whether he was speaking for himself or for Jackson, the central position that Rehnquist laid out in the memos—stressing the importance of judicial deference to the majority will—succinctly summarized what would become his judicial philosophy throughout his career.

In the *Brown* memo Rehnquist wrote that the Supreme Court was ideally suited to mediate disputes between the states and the federal government or between branches of the federal government. In contrast, he said, "where a legislature [is] dealing with its own citizens, it [is] not part of the judicial function to thwart public opinion except in extreme cases." *Brown* was not one of those cases, Rehnquist argued, because "in the long run it is the majority who will determine what the constitutional rights of the minority are." Similarly, in *Terry* v. *Adams*, Rehnquist insisted that "the Constitution does not prevent the majority from banding together, nor does it attaint success in the effort. It is about time that the Court faced the fact that white people in the South don't like the colored people."

As jarring as these memos appear now, they are consistent with the views of many political scientists today, who argue that the Court, except in rare cases, neither can nor should thwart the will of a determined national majority, and that it invites political backlash when it attempts to do so. After Rehnquist joined the Court, he was asked whether justices are able to isolate themselves from the pressures of public opinion. "My answer was that we are not able to

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TO THE FUTURE

I in completing
this poem
hope at least

to outlive the journey
from a notebook page
to the freedom of

one fair copy to be handed
to a friend and then
to other friends

one of whom may
see to it that
these words are

copied or left about so that
some person who knows nothing of
me who wrote them

may notice and
take the poem as a
delight or disturbance.

May it enlist or
puzzle readers enough so
that by undertaking its traffic

they may speak its language to
multiply its effect
and by voicing both
deliver me to you.

—PETER DAVISON (1928–2004)

Peter Davison was The Atlantic's *poetry editor for thirty years.*

do so, and it would probably be unwise to try," he recalled. Rehnquist's highly evolved pragmatism convinced him that the courts cannot ignore broad cultural shifts. This, as much as anything, distinguished Rehnquist from the later generation of judicial conservatives.

After his Supreme Court clerkship ended, in 1953, Rehnquist moved to Phoenix, always in search of warm weather and conservative politics. He joined a small law firm and became active in local Republican circles, which had been revitalized under the newly elected Senator Barry Goldwater. A decade later Rehnquist would write speeches for Goldwater's ill-fated 1964 presidential campaign, which united disparate parts of the conservative movement while alienating the liberal Rockefeller wing of the Republican Party. His speeches for Goldwater singled out for attack the Warren Court's landmark decisions requiring school busing. But unlike the Dixiecrats, who fought to protect the power of local communities to enforce traditional values, Goldwater was no social conservative, as his later support for birth control and gay rights would attest; he was a populist who ardently opposed the excesses of federal, state, and local authority. Although Goldwater dutifully denounced the Warren Court's liberal obscenity and school-prayer decisions, he had little patience for his party's growing moralistic forces, which insisted that Christian virtue, rather than liberty, should be the Republicans' highest calling. The Republican Party of the 1960s, for all its associations with extremism at the time, seems in retrospect a less strident and more inclusive organization than the party of today.

When Nixon first met Rehnquist, who was given to the loud shirts and psychedelic ties of the era, he wondered aloud, "Who's the guy dressed like a clown?" Upon hearing his name, Nixon said, "Is he Jewish?"

In 1957, after the Warren Court issued a series of controversial decisions protecting the rights of suspected Communists, Rehnquist, then a young lawyer, wrote an article in *U.S. News & World Report* criticizing the law clerks he had known for their predominantly "'liberal' point of view," which he defined as "extreme solicitude for the claims of Communists and other criminal defendants, expansion of federal power at the expense of State power, great sympathy toward any government regulation of business—in short, the political philosophy now espoused by the Court under Chief Justice Earl Warren." Rehnquist also strongly disagreed with the Warren Court's prominent role in advancing the civil-rights movement. Testifying as a private citizen before the Phoenix City Council in 1964, he opposed a local public-accommodations law, charging later that it would summarily do away with "the historic right of the owner of a drug store, lunch counter, or theater to choose his own customers." That same year Rehnquist had urged Goldwater to vote against the Civil Rights Act. During his 1971 confirmation hearings Rehnquist said that he had changed his mind about public-accommodations laws, acknowledging that he hadn't understood how strongly minorities felt about protecting their rights.

Every political movement has its moral blind spots, and civil rights was certainly a moral blind spot for Goldwater Republicanism. Rehnquist's insistence on deferring to the will of the people is hard to reconcile with his indifference to the then emerging majority of Americans who supported upholding the rights of black people. Goldwater and Rehnquist were never white supremacists, like Strom Thurmond, of South Carolina, and James Eastland, of Mississippi, but they seemed unconcerned that their devotion to states' rights could lead to enshrining racism. (Justice Byron White, a Kennedy Democrat of the same generation who shared Rehnquist's devotion to majority rule, did not make the same mistake.)

Both Goldwater and Rehnquist came belatedly to recognize the error of their ways. Rehnquist ultimately embraced the Warren Court's *Brown* decision, and after he joined the Court he made no attempt to dismantle the civil-rights revolution, as political opponents feared he would. His change of position reflected not only his reverence for the Court as an institution but also his sense that once a majority has spoken, the decision has a legal force that must be obeyed. Compare Rehnquist's attitude on these points with that of Clarence Thomas, who refuses to accept decisions that he thinks are wrong. Even Scalia has been critical of Thomas for this; as he recently told Thomas's biographer, Ken Foskett, Thomas "does not believe in *stare decisis*, period." "If a constitutional line of authority is wrong, he would say let's get it right," Scalia continued. "I wouldn't do that."

When Richard Nixon was elected president in 1968, he appointed as deputy attorney general Richard Kleindeinst, a Phoenix lawyer who had worked on his campaign. Kleindeinst persuaded Attorney General John Mitchell to hire his friend Rehnquist. As head of the Justice Department's Office of Legal Counsel, which provides constitutional advice to the president, Rehnquist distinguished himself as a conservative intellectual and an enthusiastic defender of executive power in the face of widespread social unrest. The country, Rehnquist said in a Kiwanis Club speech in 1969, had to devote all its energies to countering "the danger posed by the new barbarians." Two years later he staunchly defended the mass arrest of Vietnam protesters. That year, with Justices Hugo Black and John Marshall Harlan retiring, Nixon considered some

three dozen candidates to fill the two vacancies, including Vice President Spiro Agnew and Senator Howard Baker, of Tennessee. In an entertaining memoir, *The Rehnquist Choice*, John Dean, who was the White House counsel at the time and was later instrumental in Nixon's downfall, claims the credit (and also the blame) for being first to float the name of Rehnquist, who then was in charge of screening the other Supreme Court candidates. When Nixon first met Rehnquist, who was given to the loud shirts and psychedelic ties of the era, he wondered aloud, "Who's the guy dressed like a clown?" Upon hearing Rehnquist's name, Nixon said, "Is he Jewish? He looks it." But when the other candidacies fell by the wayside, the man Nixon was prone to call "Renchburg" won him over with his conservative credentials and unquestioned ability.

Rehnquist's first confirmation hearings focused on whether he had been truthful when he denied having challenged black and Hispanic voters as an Arizona poll watcher, and again in his account of one of his pro-segregation memos for Justice Jackson. Although Rehnquist was unanimously praised as an accomplished lawyer, he came under fire from a group of liberal Democrats on the Judiciary Committee, including Edward Kennedy, who charged that his record "reveals a dangerous hostility to the great principles of individual freedom under the Bill of Rights and equal justice for all people." Rehnquist was confirmed by a vote of 68 to 26.

As an associate justice, Rehnquist held fairly steadily to the views expressed in his *Brown* v. *Board of Education* memo of 1952. He almost invariably deferred to state legislatures on matters involving individual rights, and struck down federal laws only when he thought that Congress or the president had exceeded the bounds of constitutionally enumerated powers. The only cases in which Rehnquist was consistently willing to question federal power involved states' rights. During his first decade on the bench the most important states'-rights case for which Rehnquist wrote the majority opinion was *National League of Cities* v. *Usery*, in 1976; that case heralded the beginning of the so-called federalism revolution, which imposed meaningful limits on congressional power for the first time since the New Deal. In his opinion Rehnquist argued for limiting the federal government's ability to regulate the wages and hours of state and local government employees. The Tenth Amendment, he said, prevents Congress from acting in a way that "impairs the States' integrity or their ability to function effectively in a federal system." Although Rehnquist had mixed success maintaining majorities for this principle in the 1970s and 1980s, by the 1990s he had found at least four reliable allies—Scalia, Thomas, Kennedy, and O'Connor. But by not consistently deferring to Congress, Rehnquist failed to fulfill his oft-stated commitment to judicial restraint; under his leadership the Court indulged in more overconfident rhetoric of judicial supremacy and struck down thirty federal laws in one seven-year period—a higher rate than in any other Court in history.

In most cases, however, Rehnquist voted to uphold federal and state laws. When I re-read his youthful and often solitary dissents, which earned him the nickname "the Lone Ranger," it was hard not to be impressed by their energy, lack of pretense, and lack of anger. "The 1970s dissents were magnificent," says Jack Goldsmith, a constitutional scholar at Harvard Law School. "Rehnquist didn't have an overarching substantive theory of constitutional interpretation, but he was always respectful of the Court as an institution, even when he thought it was off the tracks."

Despite his conservative temperament, Rehnquist was never unduly preoccupied with following judicial precedents. In a biting critique published in *The New Republic* in 1982, Charles Krauthammer, the conservative essayist, and Owen Fiss, a liberal scholar at Yale Law School, charged that Rehnquist "repudiates precedents frequently and openly, and if that is impossible (because the precedent represents a tradition that neither the Court nor society is prepared to abandon), then he distorts them." Perhaps one answer to this criticism is that Rehnquist was always focused on moving the law in a fundamentally conservative direction while trying to circumvent any potential roadblocks along the way. His clerks, past and present, report that he would simply remove the reasoning from opinions if it got in the way of the result.

"He took each case as it came," recalls Michael K. Young, a former clerk who is now president of the University of Utah. "He thought that the Constitution was not designed to shape all of our behavior but to box in elected officials at the margins . . . He didn't see the sky falling, the way Scalia sometimes does, and if you read his dissents, they're often pragmatic. I've never been able to figure out *Bush* v. *Gore*, but in general he just deferred to the political process."

But even Rehnquist's highly controversial vote to stop the manual recount in Florida in the 2000 presidential election may be an expression of his pragmatism, for better or worse. In a speech to a Catholic service organization soon after the election, Rehnquist defended the participation of Supreme Court justices in deciding the presidential election of 1876 and seemed to be justifying *Bush* v. *Gore* in similarly practical terms. "There is a national crisis, and only you can avert it," he said. "It may be very hard to say no."

Typical of Rehnquist's early opinions was his 1973 dissent from *Roe* v. *Wade*. Without huffing and puffing or personal invective, Rehnquist made a straightforward but powerful case for majority rule. "The fact that a majority of the States, reflecting, after all, the majority sentiment in those States, have had restrictions on abortion for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not [deeply rooted in tradition]," Rehnquist observed. It's striking to

compare his even-tempered dissent with Scalia's wrathful and apocalyptic one nearly twenty years later. In *Planned Parenthood* v. *Casey*, the case that reaffirmed *Roe* v. *Wade*, Scalia equated abortion with slavery—both of them issues "involving life and death, freedom and subjugation"—and predicted that the Court would detonate a culture war in the same way that its *Dred Scott* decision, in 1857, precipitated the Civil War.

RESIN

The needled air of the lodgepole.
Sting of pine at the base of your throat.
"A cold snap," he says. "Coming on."

Believing wasn't always hard.
The river forked in three: I knew
truth could go in different ways.

Corn was ripe when the tassels turned.
Late. Later still potatoes to be dug—
how far out, and how deep down.

I knew. Could slant the shovel right.
I'd use my hands now, claw deep
to better cup them, one by one,

as they let go their hold on earth.
This is the soil that I am from.
Those mountains—there, the Swan,

the Mission Range, and west the Salish—
they all washed down to fill this place.
We gained by their diminishment.

The harvest's passed to other hands.
The house is sold. The sap's curling
deep into the pines. "The weather's

turned," he says. I work the pump;
I try to slough the dirt stains off.
"Predictable as an Indian."

—GERI DORAN

Geri Doran works for the Djerassi Resident Artists Program, in Woodside, California. Her forthcoming collection of poems, Resin, *received the 2004 Walt Whitman Award.*

Rehnquist's moderate religious views (he is a Lutheran, although not a conspicuously observant one) may have contributed to his relative equanimity about abortion and prayer. "If I were a betting man, I would say personally Rehnquist thinks prayer in schools is pretty silly," Michael Young says. "You won't find him as hysterical about abortion and prayer as born-again Christians, who view these decisions as substantively essential to the moral fiber of the country. Rehnquist is willing to have it decided either way by the legislatures. Scalia couches it in a concern about democratic decisions, but that's not why Scalia cares."

Rehnquist reads broadly and avidly but, unlike Scalia, never comes off as a know-it-all and has never tried to lord his intelligence over his colleagues. While Scalia rails against popular culture, Rehnquist loves to rent movies—both new and old—and also goes to movie theaters by himself to see them. (His wife, Natalie, died in 1991 after a long struggle with ovarian cancer.) It is impossible to imagine him denouncing the Court for taking sides in the culture wars, as Scalia routinely does. "The Court must be living in another world," Scalia wrote in 1996. "Day by day, case by case, it is busy designing a Constitution for a country I do not recognize."

Temperament and religious sensibility may go a long way toward explaining differences of approach—between Rehnquist, on the one hand, and Scalia and Thomas, on the other. (It's worth noting that over the past ten years Rehnquist has voted more frequently with Kennedy and O'Connor than with Scalia and Thomas.) But another part of the explanation has to do with the reaction to *Roe* within the legal community itself. Because of *Roe*, a conservative judicial movement arose in the 1980s that was determined to curtail judicial discretion at all costs. *Roe* galvanized the religious right and unleashed far more conservative outrage against the Court than Earl Warren ever did. After he became president, Ronald Reagan, declaring that he wanted to avoid what he saw as Nixon's mistakes in picking moderate justices like Harry Blackmun, Warren Burger, and Lewis Powell, directed his Justice Department to find more-reliable ways of identifying doctrinaire strict constructionists. A turning point for this conservative judicial movement came in 1985, when Reagan's attorney general, Edwin Meese, delivered a speech to the American Bar Association denouncing the Burger Court for its "jurisprudence of idiosyncrasy." Meese asserted, "It has been and will continue to be the policy of this administration to press for a jurisprudence of Original Intention," which he defined as an "endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment."

Although Rehnquist's opinions referred intermittently to this doctrine of "originalism" (most notably in cases involving the separation of church and state), he invoked constitutional history when it was convenient and otherwise ignored it. From the moment that Scalia and Thomas joined

the Court, in 1986 and 1991, respectively, they took a very different approach. Embracing the new orthodoxy with almost catechistic devotion, they insisted on the importance of construing each constitutional provision according to the presumed intentions of the Framers, no matter how disruptive or radical the consequences might be. For example, in 2003 Rehnquist wrote a majority opinion holding that Congress could allow state-government employees to sue their states for violating the Family and Medical Leave Act; Scalia and Thomas argued that this violated states' rights. "Scalia and Thomas embrace top-down theories of originalism and textualism as a principled way to control judicial discretion," Jack Goldsmith, of Harvard Law School, says. "Rehnquist is in a different, older, more pragmatic conservative tradition. He is less theoretical, often looks beyond text and history in discovering the relevant legal intentions, is more deferential to the political branches, and doesn't attempt to impose a general methodology across the board."

The gulf between Rehnquist and the Scalia-Thomas axis only widened this term and last. In *U.S.* v. *Booker*, decided in January, and *Blakeley* v. *Washington*, decided last spring, Scalia and Thomas joined three liberals on the Court in voting to strike down federal and state sentencing guidelines and in attempting to impose a sweeping new requirement that would have compelled juries to vote on each fact used to increase a sentence. Rehnquist, in contrast, sided with the more pragmatically minded justices—Breyer, O'Connor, and Kennedy—in upholding the sentencing guidelines, and avoided chaos by making the federal guidelines advisory rather than mandatory. Along the same lines, in an important terrorism case Rehnquist joined O'Connor in voting to allow the president to detain enemy combatants, but with a modest degree of judicial oversight. Meanwhile, Scalia and Thomas, in dissent, took rigid (and, as it happened, diametrically opposed) positions: Scalia argued that the president had no power to detain without congressional authorization, whereas Thomas contended that the president could do whatever he liked, without judicial or congressional oversight. Rehnquist will always take half a loaf over no loaf at all, and as chief justice he has proved far more willing than most of his colleagues to support, for the good of the Court, opinions with which he disagrees.

Rehnquist's successes as chief justice provide an object lesson for future holders of the office: having a judicious temperament is far more important than having a consistent judicial methodology.

Rehnquist's successes as chief justice provide an object lesson for future holders of the office: having a judicious temperament is far more important than having a consistent judicial methodology. Rehnquist has always understood the political demands of whatever role he is asked to play, and was careful not to transgress its boundaries. His performance in presiding over the impeachment trial of President Clinton was masterly because he refused to pontificate, confining his interventions to rulings on procedural motions, which he handed down with confidence and skill. Had he played his part in a more intrusive or polarizing way, the trial might have turned into a political circus. (As a gesture of thanks, the majority and minority leaders of the Senate gave him a ceremonial cup.) By refusing as chief justice to give interviews except about his books on Supreme Court history, and by devoutly guarding his privacy, he has helped maintain and enhance the Court's carefully cultivated aura of mystery and authority.

The younger generation of justices, both conservative and liberal, have a dramatically different attitude toward questions of personal exposure. Clarence Thomas, for example, is far more accessible and emotionally revealing; he frequently gives speeches to groups of African-American students, in which he talks, in raw and intimate detail, about his childhood, his sense of inadequacy, and his abiding anger toward the civil-rights establishment. It is impossible to imagine the intensely private Rehnquist selling a memoir for $1.5 million, as Thomas recently did. But we are living in an age of celebrity that is ravenous for personal disclosure, and pressures on the justices to accede to these demands will only grow more insistent. It may not be long before we see them turning up on the morning talk shows, as O'Connor has done, to promote themselves and discuss their feelings.

"I've always admired Robert E. Lee for his refusal to write his memoirs," Rehnquist told Brian Lamb. "If memoirs are going to be interesting, if they're not going to be saccharine, you have to say some people didn't measure up and others did . . . I think of a memoir as saying, 'When I came on the Court there were eight other justices and three or four were quite smart, but a couple of the others were creepy.' I don't want to get into that."

If the next chief justice turns out to be, as many Court watchers fear, less of a pragmatist and more of a rigid ideologue than Rehnquist, he or she may well end up dividing the Court that Rehnquist unified, and squandering its carefully constructed reserves of public trust. In that case Rehnquist's faith in majority rule, and his ability to resist the public's insistence that officeholders bare themselves in the spotlight, may seem like the scruples of a forgotten era. He may be the last of the old-fashioned judicial conservatives, who already look far more judicious than the conservatives who have arisen in their wake. And liberals may find themselves missing Rehnquist more than they could ever have imagined.

SJR

15

SENATE COMMITTEE REPORT

DATE: 4/22/05

FURTHER:

DATE TURNED
IN TO OFFICE:_____

Judiciary Committee considered SENATE JOINT RESOLUTION NO. 15

SJR 15 BAN LAWSUITS AGAINST FIREARMS INDUSTRY

Requesting the United States Congress to end the abuse of tort laws against the firearms industry.

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ _____ Committee

[ ] further referral to _____ Committee

CS Senate Bill:
[ ] Same Title
[ ] New Title

SCS House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
	X			
			✓	
	X			
CHAIR: Ralph Klein	✓			

ALASKA STATE LEGISLATURE

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Charlie Huggins
Senator

April 21, 2005

The Honorable Ralph Seekins, Chair
Senate Judiciary Committee
Alaska State Legislature
State Capitol, Room 125
Juneau AK 99801

RE: SJR 15 (End Tort Law Abuse Against Firearm Industry)

Dear Senator:

Senate Joint Resolution 15 has passed out of the Senate Labor and Commerce Committee and is now referred to your committee. I am writing to request that the bill be scheduled for the earliest convenient hearing before the Senate Judiciary Committee.

Included with this letter of request is the latest version of the bill and my sponsor statement.

If you have any questions about the bill or require further information, please feel free to call me at any time. Thank you for your consideration of this request.

Sincerely,

Senator Charlie Huggins

Enclosures

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Charlie Huggins
Senator

24-LS0757\G

SPONSOR STATEMENT

Senate Joint Resolution 15

End Tort Law Abuse Against the Firearm Industry

Senate Joint Resolution 15 addresses the abuse of our nation's courts through predatory lawsuits against the U.S. firearms industry – suits attempting to force law-abiding businesses to pay for criminal acts by individuals beyond their control. Alaska is one of thirty-three other states that have passed legislation protecting firearms and ammunition manufacturers, and this resolution will advocate for the current legislation in the United States Congress supporting this measure (**S.397**).

Lawsuits against the firearm industry are based on gun controller activist vendetta against the gun owners of this country. Even though these cases are often unsuccessful, the cost of the lawsuits threatens an important industry in America. In addition, the lawsuits do nothing to curb criminal gun violence. This resolution requests the United States Congress to stop abusive, politically driven litigation against law-abiding individuals for the misbehavior of criminals over whom they have no control.

I encourage the Legislature to champion **SJR15**. Thank you.

Contact: Ryan Moore
907-465-3878

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SJR 15
(S) Publish Date: 4/22/05

Revision Date/Time (Note if correction):
Dept. Affected: Legislature
Title "Requesting the United States Congress to end the abuse of tort laws against the firearms industry."
BRU: Legislative Council
Component: Council and Subcommittees Session Expenses
Sponsor: Senators Huggins, Therriault
Requestor: Senate Labor and Commerce
Component No.: 783

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES ( )	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2004) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation has zero fiscal impact on the Legislative Affairs Agency.

Prepared by: Karla Schofield, Deputy Director — Phone 465-6626
Division: Administrative Services — Date/Time 4/18/05 1:13 PM
Approved by: Pamela Varni, Executive Director — Date 4/18/2005
Agency: Legislative Affairs Agency

(Revised 9/2001 OMB)

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STATE & LOCAL AFFAIRS DIVISION
BRIAN JUDY, ALASKA STATE LIAISON

April 19, 2005

TO: Alaska State Legislators
FROM: Brian Judy, NRA-ILA Alaska State Liaison
RE: Senate Joint Resolution 15 – SUPPORT

On behalf of the more than 24,000 NRA members living in the State of Alaska, I respectfully urge your support for Senate Joint Resolution 15. SJR 15 would urge Congress to pass S. 397 and H.R. 800, the "Protection of Lawful Commerce in Arms Act," federal legislation which would address the reckless lawsuits being filed against the firearms industry.

S. 397 and H.R. 800 provide that lawsuits may not be brought against manufacturers and sellers of firearms and ammunition if the suits are based on criminal or unlawful use of the product by a third party. Existing lawsuits must be dismissed. These suits are intended to drive gun makers out of business by holding manufacturers and dealers liable for the criminal acts of third parties who are totally beyond their control. Suing the firearms industry for street crimes is like suing Budweiser or General Motors for drunk driving accidents.

S. 397 and H.R. 800 grant carefully tailored protection for legitimate suits by expressly allowing actions based on knowing violations of federal or state law related to gun sales, or on traditional grounds including negligent entrustment (such as sales to a child or to an obviously intoxicated person) or breach of contract. The bills also allow product liability cases involving actual injuries caused by an improperly functioning firearm (as opposed to cases of intentional misuse).

Reckless lawsuits usurp the authority of the Congress and of state legislatures, in a desperate attempt to enact restrictions that have been widely rejected. Thirty-three states, including Alaska, have enacted statutes blocking this type of litigation. Congress should follow their lead.

Senate Joint Resolution 15 is intended to help move Congress in the direction of enacting this important protection and, thus, the National Rifle Association asks for your support of this measure.

Protection of Lawful Commerce in Arms Act (Placed on Calendar in Senate)

S 397 PCS

Calendar No. 15

109th CONGRESS

1st Session

S. 397

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others.

IN THE SENATE OF THE UNITED STATES

February 16, 2005

Mr. CRAIG (for himself, Mr. BAUCUS, Mr. ALEXANDER, Mr. BUNNING, Mr. BURNS, Mr. CHAMBLISS, Mr. COBURN, Ms. COLLINS, Mr. CORNYN, Mr. CRAPO, Mr. DOMENICI, Mr. ENSIGN, Mr. ENZI, Mrs. HUTCHISON, Mr. INHOFE, Mr. ISAKSON, Mr. JOHNSON, Mr. KYL, Mrs. LINCOLN, Ms. MURKOWSKI, Mr. NELSON of Nebraska, Mr. SANTORUM, Mr. SESSIONS, Ms. SNOWE, Mr. STEVENS, Mr. THOMAS, Mr. THUNE, Mr. SUNUNU, Mr. ALLEN, Mr. VITTER, and Ms. LANDRIEU) introduced the following bill; which was read the first time

February 17, 2005

Read the second time and placed on the calendar

A BILL

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others.

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 'Protection of Lawful Commerce in Arms Act'.

SEC. 2. FINDINGS; PURPOSES.

(a) Findings- Congress finds the following:

(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

(3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms

Export Control Act.

(5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

(b) Purposes- The purposes of this Act are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

(7) To exercise congressional power under art. IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL LIABILITY ACTIONS IN FEDERAL OR STATE COURT.

(a) In General- A qualified civil liability action may not be brought in any Federal or State court.

(b) Dismissal of Pending Actions- A qualified civil liability action that is pending on the date of enactment of this Act shall be immediately dismissed by the court in which the action was brought or is currently pending.

SEC. 4. DEFINITIONS.

In this Act:

(1) ENGAGED IN THE BUSINESS- The term 'engaged in the business' has the meaning given that term in section 921(a)(21) of title 18, United States Code, and, as applied to a seller of ammunition, means a person who devotes, time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) MANUFACTURER- The term 'manufacturer' means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.

(3) PERSON- The term 'person' means any individual, corporation, company, association, firm, partnership, society, joint stock

company, or any other entity, including any governmental entity.

(4) QUALIFIED PRODUCT- The term 'qualified product' means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) QUALIFIED CIVIL LIABILITY ACTION-

(A) IN GENERAL- The term 'qualified civil liability action' means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include--

(i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including--

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18, United States Code;

(iv) an action for breach of contract or warranty in connection with the purchase of the product; or

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.

(B) NEGLIGENT ENTRUSTMENT- As used in subparagraph (A)(ii), the term 'negligent entrustment' means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) RULE OF CONSTRUCTION- The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this Act shall be construed to create a public or private cause of action or remedy.

(6) SELLER- The term 'seller' means, with respect to a qualified product--

(A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code;

(B) a dealer (as defined in section 921(a)(11) of title 18, United States Code) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level.

(7) STATE- The term 'State' includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION- The term 'trade association' means--

(A) any corporation, unincorporated association, federation, business league, professional or business organization not

organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) UNLAWFUL MISUSE- The term 'unlawful misuse' means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

Calendar No. 15

109th CONGRESS

1st Session

S. 397

A BILL

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others.

February 17, 2005

Read the second time and placed on the calendar

THIS SEARCH	*THIS DOCUMENT*	*GO TO*
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Protection of Lawful Commerce in Arms Act (Introduced in House)

HR 800 IH

109th CONGRESS

1st Session

H. R. 800

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages or injunctive or other relief resulting from the misuse of their products by others.

IN THE HOUSE OF REPRESENTATIVES

February 15, 2005

Mr. STEARNS (for himself, Mr. BOUCHER, Mr. SMITH of Texas, Ms. HART, Mr. BARTLETT of Maryland, Mr. BASS, Mr. ROGERS of Michigan, Mr. BLUNT, Mr. WILSON of South Carolina, Mr. PEARCE, Mr. REYNOLDS, Mrs. CUBIN, Mr. BRADY of Texas, Mr. BOEHLERT, Mr. NUSSLE, Mr. TERRY, Ms. PRYCE of Ohio, Mr. BAKER, Mr. BRADLEY of New Hampshire, Mr. SIMPSON, Mr. BOEHNER, Mrs. BLACKBURN, Mr. MCHUGH, Mr. SOUDER, Mr. WICKER, Mr. CANNON, Mr. BOYD, Mrs. MUSGRAVE, Mr. GARRETT of New Jersey, Mr. MANZULLO, Mr. GINGREY, Mr. DAVIS of Kentucky, Mr. MARSHALL, Mr. BONILLA, Mr. CANTOR, Mr. BACA, Mr. TANNER, Mr. LEWIS of Kentucky, Mr. SCOTT of Georgia, Mr. MICHAUD, Mr. LARSEN of Washington, Mr. HOLDEN, Mr. BERRY, Mr. TAYLOR of North Carolina, Mr. MCCRERY, Mrs. JO ANN DAVIS of Virginia, Mr. GARY G. MILLER of California, Mrs. MILLER of Michigan, Mr. SWEENEY, Mr. PENCE, Mr. DAVIS of Tennessee, Mr. AKIN, Mr. CHOCOLA, Mr. THOMAS, Mr. PETERSON of Minnesota, Mr. GILLMOR, Mr. SULLIVAN, Mr. STRICKLAND, Mr. FOLEY, Mr. NUNES, Mr. ROGERS of Kentucky, Mr. CULBERSON, Mr. OTTER, Mr. WALDEN of Oregon, Mr. REHBERG, Mr. GOHMERT, Ms. HERSETH, Mr. GIBBONS, Mr. BURGESS, Mr. WESTMORELAND, Mr. CARTER, Mr. SESSIONS, Mr. ENGLISH of Pennsylvania, Mr. RENZI, Mr. BONNER, Mr. KANJORSKI, Mr. SHUSTER, Mr. GENE GREEN of Texas, Mr. PICKERING, Mr. GOODE, Mr. ROGERS of Alabama, Mr. GORDON, Mrs. CAPITO, Mr. EVERETT, Mr. YOUNG of Alaska, Mr. TAYLOR of Mississippi, Mr. HENSARLING, Mr. MORAN of Kansas, Mr. BARRETT of South Carolina, Mr. RYUN of Kansas, Mr. MARCHANT, Mr. MACK, Mr. ADERHOLT, Mr. HEFLEY, Mr. COOPER, Mr. CALVERT, Mr. HAYWORTH, Mr. FRANKS of Arizona, Mr. ISSA, Mr. DINGELL, Mr. TANCREDO, Mr. RAHALL, Mr. SIMMONS, Mr. MILLER of Florida, Mr. THORNBERRY, Mr. POMBO, Mr. KELLER, Mr. HERGER, Mr. DOOLITTLE, Mr. SCHWARZ of Michigan, and Mr. NORWOOD) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages or injunctive or other relief resulting from the misuse of their products by others.

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 `Protection of Lawful Commerce in Arms Act'.

SEC. 2. FINDINGS; PURPOSES.

(a) Findings- The Congress finds the following:

(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

(3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by the Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups, and others attempt to use the judicial branch to circumvent the legislative branch of the Government by regulating interstate and foreign commerce through judgments and judicial decrees, thereby threatening the separation of powers doctrine and weakening and undermining important principles of federalism, State sovereignty, and comity among the several States.

(b) Purposes- The purposes of this Act are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

(6) To preserve and protect the separation of powers doctrine and important principles of federalism, State sovereignty, and comity among the several States.

(7) To exercise the power of Congress under article IV, section 1 of the United States Constitution to carry out the full faith and credit clause.

SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL LIABILITY ACTIONS IN FEDERAL OR STATE COURT.

(a) In General- A qualified civil liability action may not be brought in any Federal or State court.

(b) Dismissal of Pending Actions- A qualified civil liability action that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought or is currently pending.

SEC. 4. DEFINITIONS.

In this Act:

(1) ENGAGED IN THE BUSINESS- The term 'engaged in the business' has the meaning given that term in section 921(a)(21) of title 18, United States Code, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution

of ammunition.

(2) MANUFACTURER- The term 'manufacturer' means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.

(3) PERSON- The term 'person' means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) QUALIFIED PRODUCT- The term 'qualified product' means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) QUALIFIED CIVIL LIABILITY ACTION-

(A) IN GENERAL- The term 'qualified civil liability action' means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include--

(i) an action brought against a transfer or convicted of an offense under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, if the violation was a proximate cause of the harm for which relief is sought, including--

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of the qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of the qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18, United States Code;

(iv) an action for breach of contract or warranty in connection with the purchase of the product; or

(v) an action for death, physical injuries, or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that if the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injury, or property damage.

(B) NEGLIGENT ENTRUSTMENT- As used in subparagraph (A)(ii), the term 'negligent entrustment' means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) RULE OF CONSTRUCTION- The exceptions set forth in clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this Act shall be construed to create a public or private cause of action or remedy.

(6) SELLER- The term 'seller' means, with respect to a qualified product--

(A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code;

(B) a dealer (as defined in section 921(a)(11) of title 18, United States Code) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level.

(7) STATE- The term `State' includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION- The term `trade association' means any corporation, unincorporated association, federation, business league, or professional or business organization--

(A) that is not organized or operated for profit, and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) UNLAWFUL MISUSE- The term `unlawful misuse' means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

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Lawsuit Against Firearm Industry Thrown Out of Ohio Court

Constitution Front Page Opinion (Published) Keywords: GUNS / GUN OWNERSHIP / 2ND AMENDMENT
Source: N.R.A. WWW.NRA.ORG
Published: 10/7/99 Author: BOB EVANS, REPUBLICAN CONGRESSIONAL CANDIDATE vs TOM LANTOS for 2000
Posted on 10/07/1999 14:02:52 PDT by Bob Evans

Untitled Document

NEWS RELEASE

Lawsuit Against Firearm Industry Thrown Out of Ohio Court

NRA hails dismissal "with prejudice" as first of many proving lack of merit of suits brought by greedy lawyers and scapegoating mayors

(WASHINGTON, DC) -- Municipal lawsuits that attempt to hold lawful, legitimate manufacturers liable for criminal misuse of their products have no legal merit. That is the message of today's decision by an Ohio state judge in dismissing with prejudice the suit filed by Cincinnati -- the first such lawsuit to reach court disposition.

"This is a major victory for those who believe, as NRA members believe, that we must hold criminals accountable for their crimes," said James J. Baker, executive director of NRA's Institute for Legislative Action. "And this dismissal is a major blow for the greedy attorneys seeking enormous contingency fees and for the mayors seeking scapegoats to blame for their own failure to enforce current laws and prosecute violent criminals. We are confident that other cities that have filed such reckless lawsuits will soon hear the same message."

Baker noted that most Americans oppose these types of lawsuits. "In poll after poll, the vast majority of Americans believe these suits are wrong," Baker said. "The very notion of trying to hold a third party that operates in total compliance with the law responsible for the deviant, criminal actions of another is a notion that flies in the face of common sense and our system of American jurisprudence."

The decision to dismiss the case "with prejudice" means the City of Cincinnati cannot attempt to amend and refile the suit. The defendants include Sturm Ruger & Co., Beretta Corp. U.S.A., and Colt's Manufacturing Co.

"I commend Judge Ruehlman for understanding the Constitutional importance of the separation of powers, and for clearly stating that policy issues are reserved to the legislature," Baker said. The opinion states that, "the City's complaint is an improper attempt to have this Court substitute its judgement for that of the legislature ... only the legislature has the power to engage in the type of regulation that is being sought by the City here. Moreover, the City's request ... exceeds the scope of its municipal powers and ... violates the Commerce Clause of the United States Constitution."

During the past year, the NRA has successfully worked to enact legislation in thirteen states to prohibit municipalities from filing such frivolous lawsuits against firearms manufacturers. Included are Georgia and Louisiana, states in which such suits had been filed. Baker said NRA would continue that legislative effort next year, an effort that is drawing greater support as it has become more evident that the suits lack merit.

For more information, see HREF="http://www.FreeRepublic.com/perl/redirect?u=http%3A%2F%2Fnraila.org%2Fresearch%2F19990825-LawsuitPreemption-001.shtml">"Junk Lawsuits" Against Gun Makers.

Another interesting news item I felt you should see.....

Bob Evans
Republican Congressional Candidate vs Tom Lantos for 2000
340 Foerster St.
SF, CA 94112
415-334-9923

Please stop by my campaign web site and support a 2000 Congressional Candidate that has the balls to stand up for the 2nd Amendment and the Constitution!

Click here to enter: BOB EVANS FOR U.S. CONGRESS 2000

1 Posted on 10/07/1999 14:02:52 PDT by Bob Evans (*bob0159@pacbell.net*)
[Reply | Top | Last]

To: Bob Evans

Hurray for us! P*ss on HCI, klintoonites, and the rest of the socialists. Great post Bob!

2 Posted on 10/07/1999 14:07:04 PDT by rbosque

News

California Cities Cases Against Firearms Industry Rejected on Appeal

Court rules that "unfair trade practice" and "public nuisance" lawsuits were properly dismissed by the trial court.

SOUTHPORT, CT -- February 11, 2005 -- Sturm, Ruger & Company, Inc., (NYSE: RGR) the nation's largest firearms manufacturer, is pleased to announce that on February 10, 2005, the First Appellate District, Division One, in the Court of Appeals of the State of California, unanimously affirmed that the "unfair trade practice" and "public nuisance" lawsuits filed by San Francisco, Berkeley, Sacramento, Los Angeles, Compton, Inglewood, and West Hollywood, and the counties of San Mateo and Alameda, were properly dismissed by the trial court (In re Firearms Cases, The People et al. v. Arcadia Machine & Tool, Inc. Et al., No.'s A103211, A105309, Judicial Council Coordination Proceeding No. 4095, decided 2/10/05).

This is the latest in a long string of cases at both the trial and appeals court levels holding that manufacturers of lawfully-sold, non-defective firearms are not legally at fault if these products are subsequently illegally acquired or misused by criminals.

In dismissing plaintiff's claims against firearms manufacturers and distributors, the Appeals Court stated, "We conclude that endorsing the theory in this case would stretch the already expansive boundaries of the UCL (California's Unfair Competition Act) beyond any principled reading of the statute. In addition, supervision of the sweeping measures sought would be a Herculean task for court oversight."

The court continued, "No evidence in this case hints that any of the manufacturer defendants provided weapons to criminals or failed to properly record sales or did any of the other acts that plaintiffs characterize as high-risk business practices. They did not control the wrongful acts or encourage others to engage in questionable acts. Neither did they change their business practices to avoid proposed regulations or advise retailers on ways to circumvent the law. The record in this case shows that the only business practice that these defendants engage in is the manufacture and sale of firearms to dealers that are licensed as such by the federal government. Plaintiffs have cited no cases finding a manufacturer has engaged in an unfair practice solely by legally selling a non-defective product based on actions taken by entities further along the chain of distribution. Even plaintiffs' experts could not present an evidentiary link between the manufacturer of a firearm and a retail gun dealer who sold guns that ended up in criminal circumstances."

"Establishing public policy is primarily a legislative function and not a judicial function, especially in an area that is subject to heavy regulation. None of the evidence presented by plaintiffs support the conclusion that a manufacturer who does not undertake the kind of investigation and remedial action urged by plaintiffs and their experts has engaged in an unfair practice", continued the court.

The court concluded, "The case has progressed beyond the pleading stage and the plaintiffs have been unable to produce evidence to show the existence of a triable issue of material fact on the pleaded theories...Plaintiffs' public nuisance claim fails for lack of any evidence of causation. Their complaint attempts to reach too far back in the chain of distribution where it targets the manufacturer of a legal, non-defective product that lawfully distributes its product only to those buyers licensed by the federal government."

Sturm, Ruger President and General Counsel, Stephen L. Sanetti commented, "It should be apparent by now that, after almost seven years of intensive and costly litigation which has burdened both taxpayers and industry alike, the time has to come for plaintiffs to abandon their adversarial position against our industry, particularly at a time when national security is at stake."

"Unfortunately, at the behest of zealous agenda-driven organizations, some mayors seem determined to continue such litigation abuse despite prior court rulings. The only sure way to finally stop this wasteful litigation is swift enactment of the protection of Lawful Commerce in Arms Act as part of needed tort law reform to be considered by Congress."

"Court after court has found our responsible sales and marketing practices in this heavily-regulated industry to be

appropriate and legally correct. Violent crime is at a twenty year low, and firearms accidents are at an all-time low, due at least in part on many voluntary efforts of the responsible firearms industry," he continued.

"Let's work together with law enforcement on proven programs to surely and swiftly prosecute criminals who abuse firearms, and to help educate lawful firearms owners on proper firearms safety measures, to keep these trends going in the right direction," Sanetti concluded.

Sturm, Ruger is the nation's leading manufacturer of high-quality firearms for recreation and law enforcement, and a major producer of precision steel and titanium investment castings components for consumer industries. Sturm, Ruger is headquartered in Southport, CT, with plants and foundries located in Newport, NH and Prescott, AZ.

Find this article at:
http://www.shootingtimes.com/firearm021105

The Nation

Federal Judge Dismisses NAACP Suit Against Gun Industry

By Jeff Johnson
CNSNews.com Congressional Bureau Chief
July 21, 2003

Capitol Hill (CNSNews.com) - The latest attempt by opponents of the Second Amendment to hold the firearms industry responsible for the actions of individuals who misuse guns to commit crimes failed Monday. The U.S. District Court for the Eastern District of New York accepted a May 14 advisory jury ruling against the National Association for the Advancement of Colored People (NAACP) and several anti-gun groups that joined in the lawsuit.

Lawrence Keane, vice president and general counsel of the National Shooting Sports Foundation (NSSF), said Senior Federal District Judge Jack B. Weinstein did the right thing but went about doing it the wrong way.

"We are clearly pleased by the ultimate outcome of the case," Keane said. "We are, of course, disappointed, but not all that surprised by the route that Judge Weinstein takes because we think that the decision ... ignores New York law and is a slap in the face to the findings of the advisory jury."

After hearing six weeks of testimony, an advisory jury found that none of the firearm industry defendants had created a "public nuisance" as claimed by the NAACP. Weinstein rejected the jury's finding, but, based on the same testimony, still dismissed the case because, he said, the NAACP failed to prove that it had suffered any "special injury" as a result of the defendants' actions.

The NAACP filed the suit in 1999 - with the help of the Brady Center to Prevent Gun Violence (formerly Handgun Control, Inc.), the Violence Policy Center (VPC) and other anti-gun organizations - attempting to the hold the gun industry liable for what it called "marketing practices that resulted in a proliferation of handguns in many communities."

The NAACP did not return calls seeking comment prior to the deadline for this report.

Federal judge hears case, but state law applies in 'diversity jurisdiction'

As a federal judge, Weinstein presided over the case under federal "diversity jurisdiction" rules that allow federal courts to hear suits in which the defendants and plaintiffs do not reside in the same jurisdiction. Although the case is heard in federal court, the judge is bound by the laws of the state in which the suit is filed.

The appellate division of the New York Supreme Court ruled June 24 that manufacturers of lawful and non-defective products such as firearms cannot be sued under New York law for allegedly creating a "public nuisance" when criminals misuse those products.

"The lawful manufacture, marketing and sale of a defect-free product in a highly regulated activity [is] far removed from the downstream, unlawful use of handguns," the appeals court said, adding "that courts are the least suited, least equipped and thus the least appropriate branch of government to regulate and micro-manage the manufacturing, marketing, distribution and sale of handguns."

The decision upheld an August 2001 ruling in which New York Supreme Court Justice Louis York also dismissed the lawsuit against the gun industry filed by New York Attorney General Eliot Spitzer. York also found that Spitzer failed to tie the industry directly to the alleged "public nuisance" created by criminals misusing firearms.

"It is obvious that the parties most directly responsible for the unlawful use of handguns," York wrote, "are the individuals who unlawfully use them."

Firearms industry believes suits intended to legislate through the courts

In a press release following the May 14 jury recommendation, the NSSF called the NAACP lawsuit "an attempted end-run around Congress and state legislatures."

"This case is also an unconstitutional attempt by this court and radical, anti-gun zealots - who are orchestrating and funding this lawsuit - to impose through litigation a gun control agenda repeatedly rejected by Congress and not supported by most Americans," the NSSF stated.

Erich Pratt, communications director for Gun Owners of America, told CNSNews.com that he believes anti-Second Amendment forces have an even more sinister, underlying agenda.

"They've failed at enacting many of the gun control proposals they've sought, and so now, they're using the court to try to force the gun makers to impose these gun controls upon themselves," he said, "or they're trying to put the gun makers out of business."

The NAACP announcement of the lawsuit on July 12, 1999, lends credence to Pratt's latter assertion.

"And so, the NAACP will be filing litigation this week in the United States District Court against the gun industry **in an effort to break the backs** of those who help perpetuate this over saturation of weapons in our communities," the group's president, Kweisi Mfume, said. (Emphasis added.)

Pro-gun groups say legislation needed to stop 'frivolous suits'

In a press release responding to the May 14 recommendation, Mfume expressed "disappointment" at the jury's ruling against his group.

"When you consider that Congress is now moving to pass legislation that would prohibit lawsuits such as ours," he said, "it's only a matter of time before more innocent Americans become victims of violence as a result of the availability of illegal weapons."

The NSSF believes, however, that lawsuits attempting to hold gun makers and dealers responsible for acts committed by criminals "will not stop a single crime from occurring."

"The unfair abuse of our legal system - to burden innocent people and law-abiding companies with tremendous costs to defend their innocence - points to the reason legislation now awaiting Senate action must be passed," Keane said.

The legislation to which Mfume and Keane referred is the Protection of Lawful Commerce in Arms Act (S. 659), which has 54 cosponsors and passed the House by a vote of 285-140.

In a newspaper advertising campaign begun last Thursday in the *New York Times* , the Brady Center claims the bill will "let gun dealers get away with murder."

"Quietly sneaking through the United States Senate is an outrageous bill which will slam the courthouse door shut on countless victims of gun crimes," the ad argues. "Believe it or not, this bill...actually immunizes negligent gun dealers and gun makers against lawsuits."

The ad also charges that the bill "is a 'Stay out of Court Free' pass, exempting the gun industry from legal rules that bind every other industry in America."

Pratt told **CNSNews.com** that the Brady Campaign has either not read the proposed law or is intentionally misrepresenting its content to the public.

"Their ad is entirely ignorant and outrageous," he said, "and flies in the face of reality."

The NSSF agrees.

"[T]his popular legal reform does not grant any special protection or blanket immunity for firearms manufacturers," the group said in a statement about the bill. "Contrary to what groups like the Brady Center to Prevent Handgun Violence claim, it would not stop injured parties from bringing legitimate lawsuits, on well-established legal theories, against members of the firearms industry."

The NSSF argues that "a plaintiff truly injured by a defective product, an illegally sold firearm or a firearm sold by a dealer to an irresponsible person would still be able to bring a lawsuit against a firearm manufacturer or dealer."

A Congressional Research Service (CRS) summary of the bill is nearly identical to the NSSF interpretation.

According to the CRS, the Protection of Lawful Commerce in Arms act would only block or require to be dismissed lawsuits "against a manufacturer or seller of a firearm, ammunition or a component of a firearm that has been shipped or transported in interstate or foreign commerce, or against a trade association of such manufacturers or sellers, **for damages resulting from the criminal or unlawful misuse of a firearm** ." (Emphasis added.)

The proposal would specifically allow lawsuits to continue or be filed in the future:

- Against a seller for negligence per se, or negligent entrustment;
- For physical injuries or property damage resulting directly from a defect in design or manufacture of the firearm when used as intended;
- Against anyone who transfers a firearm knowing that it will be used to commit a crime of violence or a drug trafficking crime;
- Against a manufacturer or seller of a firearm who willfully violated a state or federal statute applicable to the sale or marketing of the firearm [if] the violation was a proximate cause of the harm for which relief is sought; or
- For breach of contract or warranty in connection with the purchase of the firearm.

Courts would be required to examine the claims made in a lawsuit against any of the parties covered by the bill. Only if the suit claimed "damages resulting from the criminal or unlawful misuse of a firearm" would the judge be required to dismiss the suit. All other claims would proceed.

Pratt said the continued attempts by anti-gun forces to use lawsuits to obtain what they can't get through legislation make passage of the Protection of Lawful Commerce in Arms act vital.

"The bottom line is," he concluded, "it's simply wrong to punish gun makers for selling a legal and constitutionally protected product in a lawful manner.

Listen to audio for this story.

E-mail a news tip to Jeff Johnson.

Send a Letter to the Editor about this article.

SJR

17

Senator Hollis French

Capitol Room 504
465-3892
465-6595 fax

MEMORANDUM

Date: April 26, 2006

To: Senator Ralph Seekins, Chair
Senate Judiciary Committee

From: Senator Hollis French HFF

RE: Request for Hearing - SJR 17 – "Urging the United States Department of Justice and the Alaska Department of Law to identify all natural resource damages from the Exxon Valdez oil spill that were unanticipated at the time of the 1991 settlement, to develop plans to remedy the damages, and to present the ExxonMobil Corporation with a request for the full $100,000,000 that is available through the "Reopener for Unknown Injury" clause of the 1991 civil settlement to carry out these plans."

This is a request that you schedule a hearing on SJR 17 – "Urging the United States Department of Justice and the Alaska Department of Law to identify all natural resource damages from the Exxon Valdez oil spill that were unanticipated at the time of the 1991 settlement, to develop plans to remedy the damages, and to present the ExxonMobil Corporation with a request for the full $100,000,000 that is available through the "Reopener for Unknown Injury" clause of the 1991 civil settlement to carry out these plans."

I have attached a copy of the bill, the fiscal note, the sponsor statement and backup material for your use. Please feel free to contact my office if you have any questions.

ALASKA STATE LEGISLATURE

SENATOR HOLLIS FRENCH

SJR 17 Exxon Valdez Reopener

Sponsor Statement

SJR 17 urges the United States Department of Justice or the Alaska Department of Law to pursue the $100 million made available for mitigation of unanticipated damages stemming from the 1989 Exxon Valdez oil spill. The 1991 civil settlement contains a "Reopener for Unknown Injury" clause which provides that between September 1, 2002 and September 1, 2006, the governments can request an additional $100 million from the Exxon Corporation if they determine that the spill had caused substantial, unanticipated harm, and present a cost-effective plan to remedy that harm. This provision is on top of the $900 million already paid for civil recovery, $100 million in criminal restitution, and a $25 million fine. This will not affect the ongoing litigation regarding the over $5 billion Exxon owes to individual Alaskans in punitive damages. The resolution also requests an update on or before March 24, 2006, the 17th anniversary of the spill, from the Attorneys General of Alaska or the United States regarding the status of this claim.

Since the spill and settlement, scientists funded by the initial payments have determined a number of unanticipated injuries to the spill zone. One major result of the spill that did not become evident until after the settlement was the 1993 crash of the herring population. Scientists since that time have determined that crude oil affected the reproductive processes of the herring, which explains the delayed onset of the population crash. Other significant discoveries regard lingering oil. A number of beaches in Prince William Sound still contain significant amounts of oil that has yet to biodegrade as expected. Since the spill and settlement, scientists have also realized the toxicity of crude oil to wildlife, a danger that was underestimated at the time. These issues, among others, show the necessity of these additional funds to restore these areas to health.

The Kenai Peninsula Borough, Kodiak Island Borough, and City of Cordova have already passed resolutions in support of this action.

January-May: State Capitol • Juneau, Alaska 99801 • (907) 465-3892 • 1 (866) 465-3892 • Fax: (907) 465-6595
June-December: 716 West 4th Avenue • Anchorage, Alaska 99501 • (907) 269-0234 • Fax: (907) 269-0238
Senator_Hollis_French@legis.state.ak.us

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSSJR 17(RES)
(S) Publish Date: 4/27/06

Revision Date/Time (Note if correction):
Dept. Affected: All
Title: Exxon Valdez Spill Damages
RDU
Component
Sponsor: Sen. French
Requester: Senate Resources Committee
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This resolution would not have a fiscal impact on any state agency.

Prepared by: Jack Kreinheder, Senior Analyst
Phone 465-4676
Division: Office of Management and Budget
Date/Time 4/17/06 1:22 PM
Approved by: Cheryl Frasca, Director
Date 4/17/2006
Agency: Office of Management and Budget

(Revised 9/7/2005 OMB)

NATIONAL DESK

WASHINGTON AT WORK; In Exxon Deal, Transportation Chief Wins Another One for the President

By KEITH SCHNEIDER, SPECIAL TO THE NEW YORK TIMES (NYT) 1673 words
Published: March 21, 1991

WASHINGTON, March 20 -

A week ago Tuesday, Lawrence G. Rawl, the chairman of Exxon, flew to Washington. In an informal ceremony at the Justice Department just before midnight he signed a $1.1 billion settlement that he hoped would put the nation's worst oil spill, and the two years of civil and criminal cases that followed, behind him and his company.

Standing with Mr. Rawl, Gov. Walter J. Hickel of Alaska and the lawyers for the Department of Justice was Transportation Secretary Samuel K. Skinner.

Once again Mr. Skinner had pulled it out for the White House, bringing to a successful conclusion talks that by all accounts could easily have tipped the other way.

"I viewed my job as a facilitator," said Mr. Skinner, a former United States Attorney from Chicago. "You had a huge amount of egos and interests that had to be blended together.

"In my experience I've found that if the principals don't want to settle they look for an opportunity to get out. In this case everybody wanted a deal because they knew the alternatives didn't make sense."

A 52-year-old lawyer and protege of James R. Thompson, the former Governor of Illinois who at one time was considered as a potential national Republican figure himself, Mr. Skinner has made his career in the capital handling domestic political issues without embarrassing the President. His background as a litigator has helped. So has his instinct for the spotlight and his good feel for the Washington social circuit. In Response to Disasters

When the tanker Exxon Valdez struck a reef in Prince William Sound in Alaska on March 24, 1989, spilling 11 million gallons of Alaska crude into the sound and turning beaches into a chaos of oil-soaked birds and dying otters, it was Mr. Skinner who was dispatched to supervise the Government's response.

Earlier that month, when machinists at Eastern Airlines went on strike, President Bush tapped Mr. Skinner instead of Elizabeth Dole, then Secretary of Labor, to handle the strike. Mr. Skinner's advice to

the President: stay out of the struggle.

In September 1989 Hurricane Hugo swept through the Caribbean and struck the mainland in South Carolina, killing 24 Americans and causing immense property damage. A month later a powerful earthquake hit the San Francisco Bay area, killing 59 people. In both disasters Mr. Skinner was called in.

Now there is the Exxon deal. With his company facing a criminal trial in April and civil litigation afterwards being prepared by the Justice Department, Mr. Rawl had been ready for months to talk. "It's been a burden to us," the Exxon chairman said in a news conference on March 13 in Irving, Tex. Eager for a Settlement

Governor Hickel, an independent, wanted a consistent source of money to continue recovery work in Prince William Sound, the source of a prosperous fishing and tourism industry.

The Federal Government was eager to settle, too. The civil case against Exxon was expected to take at least five years to litigate, and in the criminal case, scheduled to begin April 10, the Justice Department was going to be testing new applications of environmental law. Nobody knew how a jury would respond.

"The cleanup efforts Exxon had made in the sound made a significant difference," Mr. Skinner said. "Nature had also done a tremendous job there. Scientists were telling everybody this was not a multibillion-dollar damage suit."

Mr. Rawl and Lee R. Raymond, Exxon's president, flew to Juneau, Alaska, on Jan. 15 at Governor Hickel's invitation. The state and the Federal Government had agreed three weeks earlier to work together, he told them. Mr. Raymond called Mr. Skinner and told him that the Governor was seeking an agreement.

Mr. Skinner said he believed that a successful negotiation was possible, but only if it was conducted at the Cabinet level. "I said this case will not be settled by lawyers," Mr. Skinner said. "First of all, they don't know how to settle it. Second, they have a built-in conflict of interest. This could go on for years."
The Chairman Cools His Heels

On Feb. 5 Mr. Rawl and Mr. Raymond were asked to come to Washington for a meeting at the Commerce Department with the Federal and state negotiators: Mr. Skinner; Manuel Lujan Jr., Secretary of the Interior; William K. Reilly, Administrator of the Environmental Protection Agency; John Knauss, Administrator of the National Oceanic and Atmospheric Adminstration; Governor Hickel and Charles E. Cole, the Alaska Attorney General.

Mr. Rawl, a combative executive whose four-year tenure as Exxon's chairman had been marred by the oil spill, was in a dour mood, several negotiators recalled. After being asked to wait outside a conference room for 30 minutes while the government officials finished a meeting, Mr. Rawl became furious.

"I went out twice and asked them to please be patient," said Thomas A. Campbell, general counsel of the National Oceanic and Atmospheric Administration, who organized the meeting. "Rawl said: 'Just tell them they don't need to take much time. What I'm going to say is short and sweet.' He was going to tell them he's had it, he'll see them in court."

Mr. Skinner said that when the Exxon chairman entered the room he lashed out at the negotiators, saying he was sick and tired of how the company had been treated by the Government, the news media and the people of Alaska. Exxon had spent $2 billion to help clean up Prince William Sound, Mr. Rawl said, more than had ever been spent by any company for an environmental restoration project, and had received no credit.

Nobody responded until Mr. Skinner disarmed Mr. Rawl, according to participants.

"Look, Larry," said Mr. Skinner, whose department includes the Coast Guard and who has developed a personal relationship with Mr. Rawl in the two years since the spill. "Let's not relive it. If we do, we'll never get past it."

Over the next 90 minutes, participants say, the broad outline of a settlement of the civil claims was established. Following Mr. Hickel's lead, the state and the Federal Government said they were looking for at least $1 billion. Mr. Reilly insisted that the settlement include $300 million more to be put into a special fund if more damage was found, a provision that came to be known as the "reopener clause."

Mr. Rawl and Mr. Raymond said that they wanted the settlement to make Exxon immune to any more state and Federal claims, that they did not want to pay the money in a lump sum and that they hated the reopener clause.

Three more meetings were held in Washington in February and early March before lawyers were dispatched on March 3 to put the agreement into legal language. With Washington gripped by the Persian Gulf war, the group was able to work undistracted by reporters or environmental groups or other interests.

"This had to be handled by the principals only, and it had to be handled in a short period," Mr. Skinner said.

Through February, the talks were never far from collapse. "We knew the longer the discussions went on the harder it would be to put it together," the Secretary said.

Justice Department lawyers and other participants credit Mr. Skinner with keeping Exxon and government officials at the table.

When Mr. Rawl and Mr. Raymond almost walked out because of Mr. Reilly's insistence that the agreement should have a reopener clause, Mr. Skinner told them the E.P.A. administrator's signature on the agreement was vital politically. Without it, the Secretary said, the Bush Administration and Exxon would have a hard time justifying the settlement to environmental groups.

And when Exxon insisted that Mr. Reilly be barred from attending a meeting on Feb. 24, Mr. Skinner assured Mr. Reilly that the Government would not negotiate something the E.P.A. administrator was unable to accept. In the end, Exxon and Mr. Reilly accepted a provision that called for the company to spend up to $100 million after the year 2001 if more work in the sound was needed.

Mr. Skinner also kept the White House informed. During a meeting at the White House, John H. Sununu, the President's chief of staff, remarked that the $1.1 billion deal sounded "like an awful lot of money," Mr. Skinner said. But he assured Mr. Sununu that the agreement between the Government, Alaska and Exxon would be a good deal for everybody.

Exxon and its shipping subsidiary pleaded guilty to four criminal misdemeanor violations of environmental law and agreed to pay a $100 million fine. It was the largest penalty ever assessed in a pollution case, more than three times higher than the $29.7 million that the Government collected in 1990 for all environmental crimes. Even more, from the White House point of view, it makes good on Mr. Bush's campaign promise to penalize polluters.

From the state's point of view, the cost of the settlement, $1.1 billion, will keep Exxon involved in the restoration of Prince William Sound for at least a decade.

Exxon, like any corporation (or person, for that matter), would have preferred not to spend any money. But Mr. Rawl said last week that he thought the settlement was good for the company. Paid out annually over 10 years, the payments reach a maximum of $190 million this year, and then drop to $70 million each year from 1994 to 2001.

To a corporation with an annual revenue of $100 billion, the cost of the settlement each year is roughly the same as drilling two difficult offshore wells. "It will not curtail any of our plans," Mr. Rawl said. Samuel Knox Skinner Born: June 10, 1938. Hometown: Chicago. Education: B.S., University of Illinois; J.D., DePaul University. Career Highlights: 1961-68, various positions with I.B.M.; 1968-75, served in the Office of the United States Attorney for the Northern District of Illinois; 1975-77, United States Attorney for that District; 1977-89, private practice with law firm of Sidley & Austin; 1984-88, chairman, Regional Transportation Authority of Northeastern Illinois; 1988, named Secretary of Transportation. Hobbies: Flying; golf.

Photo: "I viewed by job as a facilitator," said Transportation Secretary Samuel K. Skinner of Exxon's Justice Department settlement. "You had a huge amount of egos and interests that had to be blended together." (Marty Katz for The New York Times)

CITY OF CORDOVA

February 2, 2006

Senator Hollis French
State Capitol, Room 504
Juneau, AK 99801-1182

Senator French:

As Mayor of Cordova, I strongly support SJR17 and HJR29 urging the United States Department of Justice and the Alaska Department of Law to request the full $100,000,000 that is available through the "Reopener for Unknown Injury" clause of the 1991 civil settlement from the ExxonMobil Corporation. As you are aware, the residents of Cordova and the Prince William Sound natural resources were tremendously impacted in 1989 when the *Exxon Valdez* went aground spilling approximately 11 million gallons of North Slope crude oil into our pristine waters. Many lingering effects from that oil spill still remain today.

Independent research has shown without a doubt that several beaches in Prince William Sound still contain *Exxon Valdez* oil and it still remains highly toxic. This toxicity has affected the use of the beaches by locals for recreational and cultural uses. The Prince William Sound herring fishery collapsed in 1993 when juvenile recruitment herring, which were spawned shortly after the oil spill, failed to survive to become viable spawning adult fish. Recruitment failures of Prince William Sound herring remains a chronic problem. The Prince William Sound herring fishery at one time contributed between $5 million and $12 million a year to the Cordova economy. That once lucrative herring fishery no longer exists.

These are just two examples of the lingering effects from the Exxon Valdez oil spill that no one could foresee in 1991. At this time, no one has an answer on how to correct these lingering effects. The "Reopener for Unknown Injury" clause needs to be exercised so the issues of lingering effects can be addressed.

I have attached a resolution that passed unanimously by the Cordova City Council supporting the "Reopener for Unknown Injury" clause of the settlement. The city supports your efforts to fulfill the intent of the 1991 civil settlement from the ExxonMobile Corporation.

Sincerely,

Timothy L. Joyce
Mayor City of Cordova

TLJ: sb

Cc: Representative William Thomas
Senator Albert Kookesh

CITY OF CORDOVA, ALASKA
RESOLUTION 12-05-51

A RESOLUTION OF SUPPORT BY THE CITY COUNCIL OF THE CITY OF CORDOVA, ALASKA, TO REOPEN THE 1991 CIVIL SETTLEMENT FROM THE EXXON VALDEZ SPILL AND CLAIM THE FULL $100 MILLION FOR MITIGATION OF UNANTICIPATED LONG-TERM HARM

WHEREAS, on October 9, 1991, the U.S. District Court of Alaska in Anchorage approved a settlement among Exxon, the United States, and the state of Alaska for damages to "natural resources" (publicly-owned wildlife and wild lands) from the *Exxon Valdez* oil spill (EVOS); and

WHEREAS, this settlement included a clause that provided a "Reopener for Unknown Injury," which states (essentially) that, between September 1, 2002, and September 1, 2006, Exxon shall pay to the Governments such additional sums as are required (up to $100 million) to restore oil-damaged populations, habitats, or species in the spill zone *if the injury could not reasonably have been known nor anticipated at the time of the settlement;* and

WHEREAS, unanticipated long-term harm from the *Exxon Valdez* oil spill has been clearly and conclusively demonstrated by scientists funded through the EVOS Trustee Council and, separately, through federal and state agencies, universities, and private foundations; and

WHEREAS, unforeseen damage includes delayed recovery of: 5–6 years for pink salmon; about 8 years for black oystercatchers and river otters; and 15 or more years for mussel beds and beach communities, sea otters, and fish-eating orcas (from slow replacement of losses after spill); and

WHEREAS, unforeseen damage includes species not recovered after 15 or more years such as: harlequin ducks, Pacific herring, pigeon guillemots, harbor seals (from slow replacement of losses after spill), and mammal-eating orcas (from spill losses and impaired reproduction due to high body burdens of PCBs); and

WHEREAS, unforeseen damage includes indirect effects to species like black-legged kittiwakes that were not initially harmed by the spill, but were harmed through spill-related loss of prey species such as Pacific herring; and

WHEREAS, much of the documented unforeseen damage stems from unexpectedly high levels of spilled oil, which remains buried in the intertidal zone and which NOAA scientists now estimate will take at least another 20 years to naturally degrade; and

WHEREAS, all of these long-term damages from oil were completely unanticipated at the time of settlement because the understanding of oil toxicity then held that oil only caused short-term harm at water levels of parts per million, while scientists now realize that oil also causes long-term harm at water levels of parts per billion and trillion; and

WHEREAS, because of the scientific finding that oil is more toxic than previously thought, it is critical to educate the public as to this finding and take measures to reduce risk of spills as well as to mitigate lingering harm; and

WHEREAS, none of the three parties to the settlement—Exxon, the federal government, or the State of Alaska—have petitioned to reopen the settlement.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Cordova, Alaska, hereby requests the United States Department of Justice and the State of Alaska to reopen the 1991 civil settlement and claim the entire $100 million for mitigation projects; and

BE IT FURTHER RESOLVED THAT the US Justice Department and the State of Alaska consider, at a minimum, the following potential mitigation projects.

Mitigation of lingering harm:

1. Monitor weathering and toxicity of residual oil under beaches
2. Monitor recovery of, and oil contamination in, subsistence foods on oiled beaches
3. Continue to monitor species that have not yet recovered
4. Establish, and compensate for, cost of unforeseen injury to species
5. Conduct a feasibility study and cohort epidemiology study on cleanup workers whose health may have been impaired by the EVOS cleanup
6. Study of treated and untreated beaches to determine if any treatment methods used during the EVOS cleanup actually worked; i.e., improved recovery of beach ecology over the long-term

Public education:

1. Fund an assessment of injured resources through the National Research Council
2. Fund a review and assessment of oil spill cleanup products that are not toxic to humans or the environment through the National Research Council
3. Develop and implement national education programs on new understanding that oil is more toxic than previously thought to humans and the environment (like tobacco industry settlement)

Measures to reduce risk of large spills:

1. Endow citizen oversight council for the Trans-Alaska Pipeline System (estimated cost: $25 million)

PASSED AND APPROVED THIS 7TH DAY OF DECEMBER, 2005.

Timothy L. Joyce, Mayor

ATTEST:

Lila J. Koplin, City Clerk

Kodiak Island Borough

Office of the Borough Mayor

710 Mill Bay Road
Kodiak, Alaska 99615
Phone (907) 486-9310 Fax (907) 486-9391
E-mail: jnielsen@kib.co.kodiak.ak.us

February 8, 2006

Senator Hollis French
State Capitol, Room 504
Juneau, AK 99801

Dear Senator French:

Subject: Letter of Support for SJR 17 and HJR 29

I am writing on behalf of myself and the Kodiak Island Borough Assembly to express support for Senate Joint Resolution No. 17 and House Joint Resolution No. 29.

On November 3, 2005, the Assembly unanimously adopted the attached resolution, Kodiak Island Borough Resolution No. FY2006-17, urging the United States Department of Justice and the State of Alaska to reopen the 1991 Civil Settlement from the Exxon Valdez Oil Spill and to claim the full $100 million for mitigation of unanticipated long-term harm.

The Assembly and I understand the importance of the need to develop plans to remedy the damages caused by the Exxon Valdez spill to coastal communities such as Kodiak. It is clearly in the interest of the citizens Kodiak and the citizens of Alaska to assert this claim for full payment.

Sincerely,

OFFICE OF THE MAYOR

Jerome M. Selby
Borough Mayor

Nj

Enclosure

N:\CL\MAYOR\Exxon.doc

Introduced by:	Mayor Selby
Requested by:	Assembly
Introduced:	11/03/2005
Adopted:	11/03/2005

KODIAK ISLAND BOROUGH
RESOLUTION NO. FY2006-17

A RESOLUTION OF THE KODIAK ISLAND BOROUGH ASSEMBLY URGING THE UNITED STATES DEPARTMENT OF JUSTICE AND THE STATE OF ALASKA TO REOPEN THE 1991 CIVIL SETTLEMENT FROM THE EXXON VALDEZ OIL SPILL AND CLAIM THE FULL $100 MILLION FOR MITIGATION OF UNANTICIPATED LONG-TERM HARM

WHEREAS, on October 9, 1991, the U.S. District Court of Alaska in Anchorage approved a settlement among Exxon, the United States, and the state of Alaska for damages to "natural resources" (publicly-owned wildlife and wild lands) from the Exxon Valdez oil spill (EVOS); and

WHEREAS, this settlement included a clause that provided a "Reopener for Unknown Injury," which states (essentially) that, between September 1, 2002, and September 1, 2006, Exxon shall pay to the Governments such additional sums as are required (up to $100 million) to restore oil-damaged populations, habitats, or species in the spill zone if the injury could not reasonably have been known nor anticipated at the time of the settlement; and

WHEREAS, unanticipated long-term harm from the Exxon Valdez oil spill has been clearly and conclusively demonstrated by scientists funded through the EVOS Trustee Council and, separately, through federal and state agencies, universities, and private foundations; and

WHEREAS, unforeseen damage includes delayed recovery of: 5-6 years for pink salmon, about 8 years for black oystercatchers and river otters; and 15 or more years for mussel beds and beach communities, sea otters, and fish-eating areas (from slow replacement of losses after spill); and

WHEREAS, unforeseen damage includes species not recovered after 15 or more years such as: harlequin ducks, Pacific herring, pigeon guillemots, harbor seals (from slow replacement of losses after spill), and mammal-eating orcas (from spill losses and impaired reproduction due to high body burdens of PCBs); and

WHEREAS, unforeseen damage includes indirect effects to species like black-legged kittiwakes that were not initially harmed by the spill, but were harmed through spill-related loss of prey species such as Pacific herring; and

WHEREAS, much of the documented unforeseen damage stems from unexpectedly high levels of spilled oil, which remains buried in the intertidal zone and which NOAA scientists now estimate will take at least another 20 years to naturally degrade; and

WHEREAS, all of these long-term damages from oil were completely unanticipated at the time of settlement because the understanding of oil toxicity then held that oil only caused short-term harm at water levels of parts per million, while scientists now realize that oil also causes long-term harm at water levels of parts per billion and trillion: and

WHEREAS, because of the scientific finding that oil is more toxic than previously thought, it is critical to educate the public as to this finding and take measures to reduce risk of spills as well as to mitigate lingering harm; and

WHEREAS, none of the three parties to the settlement-Exxon, the federal government or the State of Alaska-have petitioned to reopen the settlement.

NOW, THEREFORE, BE IT RESOLVED BY THE ASSEMBLY OF THE KODIAK ISLAND BOROUGH THAT the Assembly hereby urges the United States Department of Justice and the State of Alaska to Reopen the 1991 Civil Settlement From the Exxon Valdez Oil Spill and Claim the Full $100 Million for Mitigation of Unanticipated Long-Term Harm: and

BE IT FURTHER RESOLVED THAT the US Justice Department and the State of Alaska consider, at a minimum, the following potential mitigation projects:

Mitigation of lingering harm:

1. Monitor weathering and toxicity of residual oil under beaches
2. Monitor recovery of, and oil contamination in, subsistence foods on oiled beaches
3. Continue to monitor species that have not yet recovered
4. Establish, and compensate for, cost of unforeseen injury to species
5. Conduct a feasibility study and cohort epidemiology study on cleanup workers whose health may have been impaired by the EVOS cleanup
6. Study of treated and untreated beaches to determine if any treatment methods used during the EVOS cleanup actually worked; i.e., improved recovery of beach ecology over the long-term

Public education:

1. Fund an assessment of injured resources through the National Research Council
2. Fund a review and assessment of oil spill cleanup products that are not toxic to humans or the environment through the National Research Council
3. Develop and implement national education programs on new understanding that oil is more toxic than previously thought to humans and the environment (like tobacco industry settlement)

Measures to reduce risk of large spills:

1. Endow citizen oversight council for the Trans-Alaska Pipeline System (estimated cost: $25 million)

ADOPTED BY THE ASSEMBLY OF THE KODIAK ISLAND BOROUGH THIS THIRD DAY OF NOVEMBER 2005

Kodiak Island Borough

Jerome M. Selby, Borough Mayor

ATTEST:

Judith A. Nielsen, CMC, Borough Clerk

Introduced by:	Martin
Date:	12/06/05
Action:	Adopted as Amended
Vote:	7 Yes, 2 No

KENAI PENINSULA BOROUGH
RESOLUTION 2005-105

A RESOLUTION SUPPORTING REOPENING THE 1991 CIVIL SETTLEMENT FROM THE EXXON VALDEZ OIL SPILL AND CLAIMING THE FULL $100 MILLION FOR MITIGATION OF UNANTICIPATED LONG-TERM HARM

WHEREAS, On October 9, 1991, the U.S. District Court of Alaska in Anchorage approved a settlement among Exxon, the United States, and the State of Alaska for damages to "natural resources" (publicly owned wildlife and wild lands) from the Exxon Valdez oil spill (EVOS); and

WHEREAS, this settlement included a clause that provided a "Reopener for Unknown Injury," which states (essentially) that between September 1, 2002, and September 1, 2006, Exxon shall pay to the governments such additional sums as are required (up to $100 million) to restore oil-damaged populations, habitats, or species in the spill zone *if the injury could not reasonably have been known nor anticipated at the time of the settlement*; and

WHEREAS, unanticipated long-term harm from the Exxon Valdez oil spill has been clearly and conclusively demonstrated by scientists funded from the EVOS Trustee Council and separately through federal and state agencies, universities, and private foundations; and

WHEREAS, the severity and duration of the impact this oil spill would have on the native villages in Kachemak Bay, as well as the entire coastline of the Kenai Peninsula extending south from Seward to the west side of the Kenai Peninsula was not, and could not have reasonably been known as the above-described effects on species have drastically damaged these areas and the native village lifestyle, economics and populations; and

WHEREAS, all of these long-term damages from oil were completely unanticipated at the time of settlement because the understanding of oil toxicity then held that oil only caused short-term harm at water levels of parts per million, while scientists now realize that oil also causes long-term hard at water levels of part per billion and trillion; and

WHEREAS, none of the three parties to the settlement – Exxon, the federal government, or the State of Alaska – have petitioned to reopen the settlement;

NOW, THEREFORE, BE IT RESOLVED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH:

SECTION 1. That the Kenai Peninsula Borough Assembly hereby requests the United States Department of Justice and the State of Alaska to reopen the 1991 civil settlement and claim the entire $100 million for mitigation projects; and

SECTION 2. That copies of this resolution shall be sent to Governor Frank Murkowski, Senator Thomas Wagoner, Senator Gary Stevens, Senator Con Bunde, Senator Albert Kookesh, Representative Woodie Salmon, Representative Mike Hawker, Representative Mike Chenault, Representative Kurt Olson, Representative Paul Seaton, U.S. Attorney Timothy M. Burgess and Department of Natural Resources Commissioner Michael Menge.

SECTION 3. This resolution takes effect immediately upon its adoption.

ADOPTED BY THE ASSEMBLY OF THE KENAI PENINSULA BOROUGH THIS 6TH DAY OF DECEMBER, 2005.

Ron Long, Assembly President

ATTEST:

Sherry Biggs, Borough Clerk

KENAI PENINSULA BOROUGH 1964

SJR

20

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 2/14/06

FURTHER: Finance

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: _____

Judiciary Committee considered SENATE JOINT RESOLUTION NO. 20

SJR 20 CONST. AM: BENEFITS & MARRIAGE

Proposing an amendment to the section of the Constitution of the State of Alaska relating to marriage.

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

CS Senate Bill:
[ ] Same Title
[ ] New Title

SCS House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC.	AMEND
		X		
		X		
	X			
	X			
CHAIR: Ralph Seekins	✓			

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SJR20
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: OOG
Title: Constituti al Amendment relating to marriage
RDU: Elections
Component: Elections
Sponsor: Senate Judiciary Committee
Requester: Senate Judiciary Committee
Component No.: 21

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual	1.5					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	1.5					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**1.5**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

If this amendment appears on the 2006 ballot, the cost of providing information about this issue in the Official Election Pamphlet, as required by AS 15.58 is $1.5. Should the addition of this question require printing an 8 1/2 by 18 inch ballot the cost will increase to $22.0.

Prepared by: Whitney Brewster, Director — Phone 465-2644
Division: Division of Elections — Date/Time 2/14/2006, 2:45pm
Approved by: Whitney Brewster, Director — Date 2/14/2006
Agency: Office of the Lt. Governor, Division of Elections

(Revised 9/7/2005 OMB)

February 15, 2006

Alaska Legislature:

I am Cindy Boesser, a resident of Juneau since 1959. I am fortunate to be able to be married, am birthmother to one, and stepmother to another child.

I would like to testify against House Joint Resolution No. 32. I see it as being blatantly discriminatory against a minority of Alaskan Residents. It is unthinkable to suggest putting such an amendment in the great Constitution of the State of Alaska, even if 99 % of the voters approved it.

I went to college in North Carolina. My first English paper I titled, "20th Century Woman in 19th Century State". One attitude I found particularly backward was that many fellow students still didn't believe in interracial marriage. Not only were they squeamishly uncomfortable with the idea, they firmly believed, on a biblical basis, that it was "wrong". I ask you to consider, would it have been acceptable to put a resolution to the North Carolina legislature stating that "no other union is similarly situated to a marriage between people of the same race and, therefore, a marriage between people of the same race is the only union that shall be valid or recognized in this State and to which the rights, benefits, obligations, qualities, or effects of marriage shall be extended or assigned."? I think not.

Now please honestly ask yourself if, at some point in history in North Carolina, the question of interracial marriage had been put on a ballot, would not the vast majority of residents have whole-heartedly endorsed it? They certainly would have! And would it have been the right thing to do? Most certainly not.

Why would it be wrong? Because we live in a country where equal rights are supposed to be guarantied for each and every minority group, no matter how unaccepting the majority is of them. For when the majority determines the rights of the minority, none of us is safe.

We learned that lesson in the South, with the white Christian majority righteously kicking and screaming to the bitter end. We learned it through the pain of our Japanese-Americans' wartime internment, with the zealously patriotic ethnic majorities heartlessly devastating our neighbors and friends, in the name of "God and our Country". We learned it in Alaska as the Original Peoples of this land were laid waste by the dominant majority's cultural destruction, in many cases by the missionaries.

It greatly saddens me to see an effort by so-called Christian legislators proposing such a hateful amendment to our constitution. The Jesus I know loved and accepted the outcasts of society. At this point in history, gay and lesbians are still outcasts. But they are my friends, my neighbors, my co-workers, my family. I love them. I see them in long-term, committed relationships. And I insist that they deserve to receive equal compensation for their labors, which means they must receive equal benefits.

Our State Constitution is not meant to reflect the majority prejudice of each era. It is meant to protect the rights of each and every of the citizens of the great State of Alaska, even the unpopular minorities.

Please take a good hard look at history as you consider this resolution.

Sincerely,

Cindy Boesser

Cindy Boesser
875 Basin Road
Juneau, Alaska 99801

Rev. Robert Buttcane
Spiritual Director
Unity Study Group of Juneau
119 Seward Street
Juneau, Alaska 99801

February 16, 2006

Senator Ralph Seekins, Chair
Senate Judiciary Committee
State Capitol
Juneau, Alaska 99811

RE: SJR 20

Dear Senator Seekins and members of the Senate Judiciary Committee:

I am a strong proponent of marriage and would point to a number of documented studies referenced on the US Department of Health and Human Services Marriage Initiative website (http://www.acf.hhs.gov/healthymarriage/index.html) to extol the benefits of marriage. In essence, research demonstrates that married couples in healthy, committed, long term relationships are more stable, have fewer health issues and are more prosperous and productive than their unmarried counterparts. By most measures, happy, health marriages make for happier, healthier lives for individuals, families, children, neighborhoods and communities.

I am one of a growing number of people in America that believe marriage should be considered the "gold standard" for those who wish to enter into a healthy, committed, long-term relationship. Where I might differ with other marriage proponents however, is in my belief that marriage, this "gold standard" of relationships, should be available to any and all persons who aspire to unite in a healthy, committed, long-term union.

With this in mind then, the first course of action this committee might consider with regard to SJR 20 is to amend the language of the resolution to give the people of Alaska an opportunity to repeal the Marriage Amendment, Article 1, section 25 of Alaska's Constitution. If one were to fully accept the notion that marriage is the "gold standard" of healthy, committed relationships then this legislature could take no higher course in support of marriage than to take the necessary steps to remove the constitutional and statutory restrictions we now have on marriage in Alaska.

Baring this course of action I would then urge members to oppose SJR 20. I believe over time Alaska will incur substantial costs to litigate the meaning and intent of the wording of this resolution. The wording in the resolution, "(marriage) is the only union that shall be valid or recognized...and to which the rights, benefits, obligations, qualities, or effects of marriage shall be extended or assigned," is nebulous and imprecise. What exactly are the "qualities or effects of marriage?" The wording of this resolution would seem to me to be an open invitation for endless litigation.

If this wording were ratified into our Constitution, would schools need to adjust their policies to redefine how an unmarried partner of a parent with a child in that school may or may not participate in that child's school activities? Would such a Constitutional provision interfere with an unmarried couples' ability to meet the challenges of care giving for their companion? Would it become illegal for a hospital to allow a person other than a spouse to participate in their partner's care and treatment because that is ordinarily a right or obligation assigned to married persons? Today some public and private organizations in Alaska currently extend health and other benefits to unmarried partners of their employees. Would these benefits be unlawful if the language of this resolution were written into our Constitution? If, because of such a Constitutional amendment an organization decided to stop providing benefits to unmarried partners of their employees isn't it fair to assume that some of those individuals will turn to state funded welfare and medical assistance programs to get their needs met? Could this proposed language be used by a municipality or some future legislature to make it a criminal offense for persons to engage in any form of public displays of affection unless they have a valid and lawful marriage license? These are just a few of the questions and circumstances that serve to illustrate the point that the wording of this resolution is ambiguous and would lead to more, not less, confusion and uncertainty.

Perhaps the most important argument against this resolution is its inherent conflict with the fundamental principle of our state's Constitution, that all people, ALL people, are equal and are entitled to equal opportunity, equal protection and equal process of law. This resolution is inconsistent with the value of equality Taken to its logical end the proponents of this resolution will never fully realize their objectives to limit certain privileges and opportunities to one defined group unless the idea of equality itself is extricated from our Constitution. Codifying inequality in our Constitution, laws and policies is contrary to my understanding of the equanimity we share as children of divine creation and goes against the most fundamental principle of our agreements of governance.

This resolution raises more questions than it would seem to answer, it is discriminatory and I urge you to find the courage and clarity to oppose the passage of SJR 20.

Sincerely,

Rev. Robert Buttcane

Rev. Robert Buttcane

February 16, 2006

Alaska Legislature
Senate Judiciary Committee

Testimony re: SJR 20 - Constitutional Amendment: Benefits & Marriage

Senators:

This bill invites comparisons to George Wallace in the schoolhouse door arguing that the people of Alabama have the right to be racist, if that's what the people of Alabama want. When you vote on it, you will, of course, have to deal with the political and personal ramifications of that, but that's not the point I want to focus on. I want to address something obvious that seems to have been overlooked.

You only need to look as far as your own children to see that this bill is bad for Alaska. My daughter was born in Alaska, graduated from McGill University with honors, and is working for a program that serves homeless and HIV individuals in San Francisco. She is applying for dual graduate studies in law and public health. She is exactly the kind of young professional that the State of Alaska has been working hard to attract and retain in our state. This bill says to her, "we don't care what you have to offer, if you want a domestic partner of the same sex, please take your education, skills and dedication elsewhere."

My son was born in Alaska and won prizes in the Alaska science fair for work on salmon genetics. Now he is on an AP track for math and science at a boarding school in Victoria, where he is also building a network of international relationships. He works summers as a lab assistant at the Auke Bay Lab. He represents exactly the skills and interests President Bush says he wants to promote in America. This bill says to him, "Alaska will not offer you a competitive employment opportunity unless you are straight, because your sexual orientation is more important to us than your ability."

One of these young people is straight; the other isn't. I don't think Alaska should write one of them off. This bill creates a strong economic incentive for thousands of GLBT Alaska youth to pursue their lives outside Alaska. Can we afford to turn our backs on all that talent? Is that the best way to deal with this issue?

Thank you,

Scott Miller
4010 Ridge Way
Juneau, Alaska 99801

SENATE JUDICIARY TESTIMONY
SJR 20
February 16, 2006

My name is Marsha Buck; I'm here representing PFLAG Juneau. PFLAG stands for Parents, Families, and Friends of Lesbians and Gays.

I am here to testify against SJR 20 as a mother who taught her daughters to tell the truth, to be honest, not to tell lies. You probably taught your children the same. Yet the resolution before us appears to be more political than honest. It does not fit what is important to Alaskan mothers.

The wording says it is about MARRIAGE but it is clear to me and will be clear to all Alaskans, that it is about eliminating the equal protection guarantees of our beloved Constitution. If it were really about marriage it would address the root causes of marriage failure in our country today, things like failure to be honest which includes adultery. Wouldn't it be interesting if this Resolution were to address THAT and say that rights and benefits could only be assigned if there were no lies told? But I digress.

This Resolution appears to wipe out equal protection guarantees of the Constitution that we Alaskans cherish. It does so by creating a huge group of 2nd class citizens in Alaska, among them couples and families who are like my daughter and her family. And I want you to know that my daughter and others like her who I am honored to know deeply go to church on Sunday, hold steady jobs, pay their taxes on time and save money into 401(K)s, place a high value on family and raising healthy children, and are monogamous. Are you saying by this Resolution that these things are not important to support? Are you saying that Alaska's Constitution should discriminate against hardworking family people like my daughter?

I have been voting in both urban and rural Alaska for almost 40 years now and when I vote for my legislators, I vote for Alaskans who will uphold our Constitution as they swear to do, who will participate in the political process with the equal protection of all represented citizens continuously in mind, and who are honest in the same way you and I teach our children to be honest. If you support this Resolution, aren't you saying you have an entirely different set of values in mind? I would ask you all to vote against SJR 20 here in Senate Judiciary.

My name is Mallory Story

My address 12069 Cross St

I am a sophomore at JDHS and a member of the Gay Straight Alliance and I ~~am against this bill~~. would ask you ~~to vote~~ No on this bill. not to support this resolution.

Growing up in Alaska I've always been proud of my State and I feel that it is always working towards being open and accepting of diversity and not a state where discrimination is tolerated. I feel that this bill is a step backwards from this direction. I do not believe that one type of family is better to bring up a child than another and I think this bill is biased and selective to one type of family. This bill would open up huge doors for numerous types of discrimination.

Thank you for allowing me to testify. ~~Please vote~~ I would request that you do not ~~vote against this bill~~. support this resolution.

My name is Joelle Ballam-Schwan

My address is 12090 Cross St

I am a student at JDHS and vice president of the Gay Straight Alliance, I am against this proposed resolution and ask you not to support it.

Not only am I a youth today but a human being. As a human being, at an early age I learned the difference between right and wrong. I learned that discrimination is always wrong and this resolution is discriminatory. I may not understand every legislative detail this proposed resolution entails, but I do know that it would be ~~it is~~ stating to us kids that it is legal to discriminate and practice bigotry. Webster defines bigotry as: "Behavior, attitude or act of intolerance." If it says we are allowed to do ***that*** in our CONSTITUTION than what is this telling me today as a youth? Thank you for listening.

February 16, 2006

We are Mark and Mildred Boesser, 79 & 80 years old, respectively
We have been married 57 years, have been Alaska residents since 1959.
We have raised 4 daughters, (now in their 50's) who work in Juneau –
and have grandchildren ranging in age from middle school to their
early twenties

Mildred is a retired teacher, and served on Juneau's first Human Rights Commission. I am 55 years a priest - 45 of them served in Alaska and am now designated as Archdeacon of SE Alaska for the Episcopal Church. ~~Diocese of Alaska.~~

Senate Joint Resolution #20

We come to ask you in all sincerity to reject (that is: vote "No" on) the House Joint Resolution No. 32 proposing an amendment to the Constitution of the State of Alaska relating to Marriage.

We assure you that we are aware of the values that accrue from a healthy marriage, complete with the benefits which support such an institution. Those of us who receive those benefits may sometimes forget how important they are and the difference it would make in our lives should they be taken away or were never there in the first place.

We are here today because this resolution appears to ~~be an attempt~~ want to put before the voting public an amendment which, if passed, would write discrimination into our Constitution.

Taking the Associated Press report (Matt Volz, Feb 14, 2006) at face value: "An amendment to the state constitution has been introduced in the Alaska Legislature with the aim of overturning a court ruling and banning benefits to the same sex partners of public employees," one can hardly miss the intent.

(The Alaska Supreme Court ruled in October that denying gay couples the same public employee benefits as married couples -- life and health insurance, plus retirement and death benefits, violates the Alaska Constitution equal-protection clause.)

The very idea of using the Alaska Constitution, - intended to guarantee basic human rights for all,- to intentionally remove the rights and benefits from one segment of the population, thereby making them 2nd class citizens....We can hardly believe it! It certainly sounds like ~~attempting to~~ codify discrimination against a particular group of people.

Our oldest daughter is 53 years old and has lived in a monogamous, faithful relationship for 26 years. She and her partner have held responsible jobs for over two decades, own their own home free and clear, pay all taxes due, and are the kinds of persons any family would be proud to call their own. They have lived all these years without consequential benefits given to married couples. The "catch 22" is that they are not allowed to be married in Alaska because they are lesbians. Regretably, that has already been written into the Constitution. That's not at issue here. Surely you see the irony. The proposed resolution says that benefits can only be given to married couples, but marriage is denied a significant number of Alaskan citizens, including our daughter.

Believe it: Mildred and I are thoroughly in favor of the institution of Marriage. But take it from us, there is no way that allowing benefits to these non-marriageable persons can hurt our marriage or yours, or anyone elses. To couch this resolution to make it sound as if the vote is about marriage is to terribly mislead the public on the basic issue of equal rights for all.

As far back as 1976 the National General Convention of the Episcopal Church expressed its conviction that homosexual persons are entitled to equal protection of the laws with all other citizens, and called upon our society to see that such protection is provided in actuality

In our view, this proposed amendment would go off in the exact opposite direction. We appeal to you to reject it.

Thank You.

hello. My name is Sonne Kyle-Olsen, I am 16 years old and I attend Juneau-Douglas Highschool.
I am an incredibly active member of my school's Gay-Straight Alliance, as well as president of the Sophomore Class. I love to be a part of our society, and everyday I'm learning something new, or I'm getting the opportunity to participate in ~~something~~ ~~intriguing~~. the community

recent'y, I've been paying a lot of attention to the proposed amendment of State Resolution No. 32 relating to Marriage.
As a youth, I am incredibly impressioned, and I feel that taking away the benefits of a gay marriage is putting the impression that being discriminatory is okay, and what k ad of society is that when you grow up believing arogance, biligerance and even violence is ay?
I grew up in Albequrque, New Mexico, where the state law is that gay marriges and couples do not recieve credibl rights, benefits, qualities, effects o obligations.
My mother had 3 gay best friends, 2 of whom were suffering HIV aids together, but couldn't receive medical insurance, or important life-saving medication, and they died, ~~leaving my mother to heartbreak~~.
Miguel and Bernardo would babysit me, and they were in the glow of their lives, and they loved me, and I adored them. To grow up without them because of a discriminative law, is painful. They were abused physically a id emotionally, and I don't think that this is appropriate. By passing this ~~amendment, it's opening a window~~ to allow what happened to my beloved f iends, happen to members of our gay community here in Juneau, or anyw ay in Alaska, or the US.
Just ask yourself this: by passing this amendment, is that making it okay for me, a youth, a future leader, a highschooler, a teenager, a daughter, a friend, to discriminate against gays and their benefits? Can we move as nation backwards from what "America home of the Free" initiated?

thank you.

Marriage Amendment

1998

Superior Ct. right to choose life mate

Benefits + privileges + duties

(Pre-opposed benefits were inseparable from the

Seperation of marriage status from marriage benefits.

Constitutionally required benefits to unmarried same-sex relationships.

Examples:

- Private employers will be required to extend the same benefits.
- implied covenant of good faith + fair dealing.

(Equal pay for equal work)

- Legislature is not making law...
- is not invading privacy...

California - domestic partner.

- do the people have the right to vote on this ~~[illegible]~~ matter?
-

- Amendment — Mono
  ↓ marriage

- must married
- cannot get married — must get benefits of marriage.
-

→ will of the people

→ will people vote it up or down?

Andrea Doll

morality?

- who told you that?

ACLU v. State & Municipality of Anchorage (10/28/2005) sp-5950

THE SUPREME COURT OF THE STATE OF ALASKA

ALASKA CIVIL LIBERTIES UNION, DAN CARTER and AL INCONTRO, LIN DAVIS and MAUREEN LONGWORTH, SHIRLEY DEAN and CARLA TIMPONE, DARLA MADDEN and KAREN WOOD, AIMEE OLEJASZ and FABIENNE PETER-CONTESSE, KAREN STURNICK and ELIZABETH ANDREWS, THERESA TAVEL and KAREN WALTER, CORIN WHITTEMORE and GANI RUTHELLEN, and ESTRA BENSUSSEN and CAROL ROSE GACKOWSKI,	) Supreme Court No. S- 10459) Superior Court No. 3AN-99-11179 CI) O P I N I O N) [No. 5950 - October 28, 2005]
Appellants,	
v.	
STATE OF ALASKA and MUNICIPALITY OF ANCHORAGE,	
Appellees.	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Stephanie Joannides, Judge.

Appearances: Allison E. Mendel, Mendel & Associates, Anchorage, Kenneth Y. Choe,

American Civil Liberties Union Foundation, New York City, New York, and Tobias B. Wolff, Davis, California, for Appellants. John B. Gaguine, Assistant Attorney General, and Bruce M. Botelho, Attorney General, Juneau, for Appellee State of Alaska. Neil T. ODonnell, Atkinson, Conway & Gagnon, Anchorage, for Appellee Municipality of Anchorage. James M. Gorski, Hughes, Thorsness, Gantz, Powell, Huddleston & Bauman LLC, Anchorage, for Amicus Curiae The Alaska Catholic Conference. Rebecca L. Maxey, Law Offices of Rebecca L. Maxey, L.L.C., Anchorage, and Jennifer Middleton, Lambda Legal Defense and Education Fund, Inc., New York City, New York, for Amicus Curiae Lambda Legal Defense and Education Fund, Inc. Kevin G. Clarkson, Brena, Bell & Clarkson, P.C., Anchorage, for Amici Curiae North Star Civil Rights Defense Fund, Inc. and Marriage Law Project.

Before: Fabe, Chief Justice, Matthews, Eastaugh, Bryner, and Carpeneti, Justices.

EASTAUGH, Justice.

I. INTRODUCTION

The State of Alaska and the Municipality of Anchorage offer valuable benefits to their employees spouses that they do not offer to their unmarried employees domestic partners. Essentially all opposite-sex adult couples may marry and thus become eligible for these benefits. But no same-sex couple can ever become eligible for these benefits because same-sex couples may not marry in Alaska.1 The spousal limitations in the benefits programs therefore affect public employees with same-sex domestic partners differently than public employees who are married. This case requires us to determine if it is reasonable to pay public employees who are in committed domestic relationships with same-sex partners less in terms of employee benefits than their co-workers who are married. In making this determination, we must decide whether the spousal limitations in the benefits programs violate the rights of public employees with same-sex domestic partners to equal rights, opportunities, and protection under the law.2

The Alaska Constitution dictates the answer to that constitutional question. Irrelevant to our analysis must be personal, moral, or religious beliefs held deeply by many about whether persons should enter into intimate same-sex relationships or whether same-sex domestic partners should be permitted to marry. It is the duty of courts to define the liberty of all, not to mandate [their] own moral code.3 Our duty here is to decide whether the eligibility restrictions satisfy established standards for resolving equal protection challenges to governmental action.

We do not need to decide whether heightened scrutiny should be applied here because the benefits programs cannot

withstand minimum scrutiny. Although the governmental objectives are presumably legitimate, the difference in treatment is not substantially related to those objectives. We accordingly hold that the spousal limitations are unconstitutional as applied to public employees with same-sex domestic partners, and we vacate the judgment below. We ask the parties to file supplemental memoranda addressing the issue of remedy.

II. FACTS AND PROCEEDINGS

The State of Alaska and the Municipality of Anchorage offer health insurance and other employment benefits to the spouses of their employees.4 These benefits are financially valuable to employees and their spouses. Only couples who are married are eligible to receive these benefits; unmarried couples are not eligible. The state and the municipality have offered some form of these employment benefits since 1955 and at least 1985, respectively.

The Alaska Civil Liberties Union and eighteen individuals who alleged that they comprised nine lesbian or gay couples (collectively, the plaintiffs) filed suit against the state and the municipality in 1999, complaining that these benefits programs violated their right to equal protection under the Alaska Constitution. They alleged that at least one member of each same-sex couple was an employee or retiree of the state or the municipality, that the eighteen individual plaintiffs were involved in intimate, committed, loving long-term relationships with same-sex domestic partners, and that, as gay and lesbian couples, they are excluded by state law from the institution of marriage. Members of eight of the couples asserted in affidavits that they are in committed relationships.5 Their amended complaint alleged that because they are prohibited from marrying each other by Alaska Constitution article I, section 25, they are ineligible for the employment benefits the defendants provide to married couples, resulting in a denial of the individual plaintiffs right to equal protection.

Article I, section 25 was adopted by Alaska voters in 1998. Commonly known as the Marriage Amendment, it provides: To be valid or recognized in this State, a marriage may exist only between one man and one woman. It effectively prohibits marriage in Alaska between persons of the same sex.6 The plaintiff employees consequently cannot enter into the formal relationship marriage that the benefits programs require if the employees are to confer these benefits on their domestic partners.

Put another way, the plaintiff employees and their same-sex partners are absolutely precluded from becoming eligible for these benefits. Although all opposite-sex couples who are unmarried are also ineligible for these employment benefits, by marrying they can change the status that makes them ineligible.

The plaintiffs did not challenge the Marriage Amendment in the superior court (nor do they on appeal). Instead, their amended complaint asked the superior court to declare that denying employment benefits to same-sex domestic partners violates, among other things, article I, section 1 of the Alaska Constitution, which states in part: This constitution is

> dedicated to the principle[] . . . that all persons are equal and entitled to equal rights, opportunities, and protection under the law.

All parties moved for summary judgment. The superior

court denied the plaintiffs motion and granted the defendants motion. The court first rejected plaintiffs assertion that it was necessary to apply heightened scrutiny in considering their equal protection challenge; the court reasoned that heightened scrutiny was unwarranted because the state and the municipality were discriminating between married and unmarried employees, not between opposite-sex and same-sex couples. The court also determined that the only right at issue was a right to employee benefits, which it ruled was not a fundamental right. Because the court found that no suspect class or fundamental right was involved, it applied the lowest level of scrutiny to the governmental action. The court ruled that the defendants had a legitimate interest in reducing costs, increasing administrative efficiency, and promoting marriage. It then ruled that granting benefits only to spouses of married employees bore a fair and substantial relationship to those interests.

The plaintiffs appealed. Briefing on their appeal was completed and oral argument took place before the United States Supreme Court decided Lawrence v. Texas.7 With our permission, the parties filed supplemental briefs discussing Lawrence.

III. DISCUSSION

A. Standard of Review

We review a grant or denial of summary judgment de novo.8 Summary judgment is only appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.9 Deciding the applicable standard of scrutiny in an equal protection challenge to an allegedly discriminatory statute presents a question of law.10 Likewise, identifying the nature of the challengers interest and assessing the importance of the governmental interest and the fit between that interest and the means chosen to advance it, present questions of law.11 We will apply our independent judgment to questions of law and adopt the rule of law most persuasive in light of precedent, reason, and policy.12 We apply our independent judgment when interpreting constitutional provisions or statutes.13 A constitutional challenge to a statute must overcome a presumption of constitutionality.14

B. Effect of the Marriage Amendment on Plaintiffs Equal Protection Arguments

The plaintiffs, in challenging the spousal limitations in the benefits programs, rely on article I section 1 of the Alaska Constitution, which guarantees the right to equal treatment. It states that all persons are equal and entitled to equal rights, opportunities, and protection under the law.15 Often referred to as the equal protection clause, this clause actually guarantees not only equal protection, but also equal rights and opportunities under the law.16

But Alaska Constitution article I, section 25, the Marriage Amendment, states that [t]o be valid or recognized in this State, a marriage may exist only between one man and one woman. It effectively prohibits same-sex domestic partners from marrying in Alaska and denies recognition in Alaska to foreign marriages between same-sex couples.17 We must decide as a threshold matter whether, as contended by the municipality and amici curiae North Star Civil Rights Defense Fund, Inc. and the Marriage Law Project, the Marriage Amendment precludes challenges

by same-sex couples to government policies that discriminate between married and unmarried couples.

We must give effect to every word, phrase, and clause of the Alaska Constitution.18 [S]eemingly conflicting parts are to be harmonized, if possible, so that effect can be given to all parts of the constitution.19

The Alaska Constitutions equal protection clause and Marriage Amendment can be harmonized in this case because it concerns a dispute about employment benefits. The Marriage Amendment effectively precludes same-sex couples from marrying in Alaska, but it does not explicitly or implicitly prohibit public employers from offering to their employees same-sex domestic partners all benefits that they offer to their employees spouses. It does not address the topic of employment benefits at all.20

Nor have we been referred to any legislative history implying that, despite its clear words, the Marriage Amendment should be interpreted to deny employment benefits to public employees with same-sex domestic partners.21 The Marriage Amendment could have the effect of foreclosing the present challenge only if it could be read to prohibit public employers from offering benefits to their employees same sex domestic partners. But nothing in its text would permit that reading, and indeed the state and the municipality implicitly assume on appeal that governments are free to offer employment benefits to their employees unmarried, domestic partners, including same-sex domestic partners.

Because the public employers benefits programs could be amended to include unmarried same-sex domestic partners without offending the Marriage Amendment, that amendment does not foreclose plaintiffs equal protection claims here. That the Marriage Amendment effectively prevents same-sex couples from marrying does not automatically permit the government to treat them differently in other ways. It therefore does not preclude public employees with same-sex domestic partners from claiming that the spousal limitations in the benefits programs invidiously discriminate against them.

The state equal protection clause cannot override more specific provisions in the Alaska Constitution.22 But the plaintiffs do not contend that the Marriage Amendment violates Alaskas equal protection clause. They argue not that they have a right to marry each other, but that the benefits programs discriminate against them by denying them benefits that the programs provide to others who, plaintiffs claim, are similarly situated.

Because the Marriage Amendment does not resolve this appeal, we turn to the merits of plaintiffs equal protection arguments.

C. Challenge to the Spousal Limitations Under the Equal Protection Clause of the Alaska Constitution

Article I, section 1 of the Alaska Constitution mandates equal treatment of those similarly situated; it protects Alaskans right to non-discriminatory treatment more robustly than does the federal equal protection clause.23 We have long recognized that [this clause] affords greater protection to individual rights than the United States Constitutions Fourteenth Amendment.24

To implement Alaskas more stringent equal protection standard, we have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interest at stake 25

1. The benefits programs distinctions between same-sex and opposite-sex domestic partners

A person or group asserting an equal protection violation must demonstrate that the challenged law treats similarly situated persons differently.26 Absent disparate treatment of similarly situated persons, the law as applied to the aggrieved group does not violate the groups right to equal protection.27 We first consider whether, as the municipality contends, there is no evidence of differential treatment, making it unnecessary to engage in a sliding-scale analysis.28

The plaintiffs assert that the defendant governments treat same-sex and opposite-sex couples differently. The defendants argue that their programs differentiate on the basis of marital status, not sexual orientation or gender. The municipality asserts that all married employees can confer benefits on their spouses, and no unmarried employees can confer benefits on their partners. It therefore argues that it treats same-sex couples no differently than any other unmarried couples, and that there is consequently no basis for an equal protection claim. Several courts examining similar programs have reached this conclusion.29

We must therefore decide whether there is a classification that results in different treatment for similarly situated people.

We agree with the plaintiffs that the proper comparison is between same-sex couples and opposite-sex couples, whether or not they are married. The municipality correctly observes that no unmarried employees, whether they are members of same-sex or opposite-sex couples, can obtain the disputed benefits for their domestic partners. But this does not mean that these programs treat same sex and opposite-sex couples the same. Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners.30 In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits, because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska. Same-sex unmarried couples therefore have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying. The programs consequently treat same-sex couples differently from opposite-sex couples.31

2. Intent to discriminate

The state argues that an intent to discriminate is, or should be, an essential element of a state equal protection claim in Alaska. Both defendants contend that there was no discriminatory intent, or evidence of animus against gays and lesbians. Plaintiffs respond that Alaskas equal protection clause does not require a showing of discriminatory intent.

We need not resolve this dispute here because we conclude that the benefits programs are facially discriminatory. When a law by its own terms classifies persons for different treatment, this is known as a facial classification.32 And when a law is discriminatory on its face, the question of discriminatory intent is subsumed by the determination that the classification established by the terms of the challenged law or policy is, itself, discriminatory.33

To determine whether the benefits programs make a facial classification, we must therefore examine the meaning of the term spouse. The United States Supreme Court, in Personnel Administrator v. Feeney, considered whether a state statute granting a hiring preference to veterans violated equal protection on the basis of gender.34 The Court concluded in part that the statute was gender-neutral because the definition of veterans in the statute ha[d] always been neutral as to gender and that Massachusetts ha[d] consistently defined veteran status in a way that ha[d] been inclusive of women who ha[d] served in the military 35

But unlike the neutral definition of veteran in Feeney, Alaskas definition of the legal status of marriage (and, hence, who can be a spouse) excludes same-sex couples.36 By restricting the availability of benefits to spouses, the benefits programs by [their] own terms classif[y] same-sex couples for different treatment.37 Heterosexual couples in legal relationships have the opportunity to marry and become eligible for benefits. In comparison, because of the legal definition of marriage, the partner of a homosexual employee can never be legally considered as that employees spouse and, hence, can never become eligible for benefits. We therefore conclude that the benefits programs are facially discriminatory.38

The next question is whether the disparate treatment is permitted under the sliding-scale analysis for equal protection challenges in Alaska.39

3. Sliding-scale analysis under the Alaska Constitution

Having resolved these preliminary issues by determining (1) that it cannot be said as a matter of law that the benefits programs do not treat public employees with same-sex domestic partners differently, and (2) that the benefits programs are facially discriminatory, we turn to the three-step, sliding-scale analysis applicable to equal protection challenges under the Alaska Constitution. This approach involves the following process:

> First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review . . . . Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.
>
> Second, an examination must be

> undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.
>
> Third, an evaluation of the states interest in the particular means employed to further its goals must be undertaken. Once again, the states burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.[40]

The plaintiffs advance four alternative arguments to support their equal protection challenge to the spousal limitation in the benefits programs. The first three ask us to apply a heightened level of scrutiny because the programs allegedly (1) discriminate on the basis of sexual orientation; (2) discriminate on the basis of gender; or (3) significantly burden at least one of several important personal interests. The plaintiffs alternatively contend that the programs cannot withstand even the minimum level of scrutiny, either because the governmental interests advanced are not legitimate, or because the eligibility restrictions do not bear a fair and substantial relationship to advancing those interests.

Because we conclude that the benefits programs cannot survive minimum scrutiny, we need not address plaintiffs alternative arguments.

a. Nature of plaintiffs interests: level of scrutiny

The first step of our analysis requires us to determine what weight to give the individual interests affected by the benefits programs.41 Plaintiffs contend that the spousal limitations significantly burden important personal interests, such as the right to intimate association, and are therefore subject to heightened scrutiny. But because minimum scrutiny is sufficient to resolve this case, we do not need to decide whether the plaintiffs interests are important or whether a fundamental right is affected.42 Government action affecting an economic interest receives minimum scrutiny,43 and the employment benefits at issue here are undeniably economic.

b. The governmental interests and the relationship between those interests and the means chosen to advance them

The second step of the sliding-scale analysis requires us to consider the governmental interests advanced by a challenged law.44 Under minimum scrutiny, these interests need only be legitimate.45 The third step requires us to evaluate the means chosen to advance the interests identified from the second step. Minimum scrutiny requires a fair and substantial relation between the means (i.e., the classification) and the object of the legislation.46

The state and the municipality contend that they have three legitimate interests cost control, administrative efficiency, and promotion of marriage in limiting employment benefits to spouses and dependent children. We must therefore consider whether these interests are legitimate and, if so, whether the classification bears a fair and substantial relationship to those interests.

Cost control. The state and the municipality argue that cost control is a primary purpose of limiting the availability of benefits to spouses of married employees. The state explains that it must offer health insurance to attract and retain a qualified work force and that the legislature should be entitled to take reasonable measures to control the cost of that offering. As the number of program participants increases, so does the cost.

The state also asserts that the legislature wanted to limit participation to that small group in a truly close relationship with the employee. The municipality asserts that it decided to limit employee benefits to a small, readily ascertainable group of individuals closely connected to the employee. These assertions indicate to us that the governmental interest here is more specific than just cost control. Indeed, if the governments were interested in simply saving money, the companion goal of promoting marriage would seem to do the opposite. As the benefits programs succeed in convincing couples to marry or to stay married, the governments have to provide benefits to more people. This apparent tension between cost control and promotion of marriage can be harmonized by more appropriately describing the governments interest in cost control as an interest in controlling costs by limiting benefits to those people in truly close relationship[s] with or closely connected to the employee.

We assume that limiting benefit programs to those in truly close relationships with the employee is a legitimate governmental goal. But we do not see how an absolute exclusion of same-sex domestic partners from being eligible for benefits is substantially related to this interest. Many same-sex couples are no doubt just as truly close[ly] relat[ed] and closely connected as any married couple, in the sense of providing the same level of love, commitment, and mutual economic and emotional support, as between married couples, and would choose to get married if they were not prohibited by law from doing so. Although limiting benefits to spouses, and thereby excluding all same-sex domestic partners, does technically reduce costs, such a restriction fails to advance the expressed governmental goal of limiting benefits to those in truly close relationships with and closely connected to the employee.

Administrative efficiency. The state and the municipality argue that the need to efficiently administer the

benefits programs justifies the spousal limitations. They argue that marriage provides a bright-line distinction that is easily applied, and that allowing employees to designate beneficiaries other than spouses will make it more difficult to administer the programs. The director of the benefits section of the Alaska Division of Retirement and Benefits explained during deposition the potential administrative difficulties that could arise if employees were allowed to designate benefits recipients other than spouses. She discussed theoretical burdens of determining who other than a spouse might be eligible for coverage. The municipality anticipates difficulty in deciding how long a same-sex relationship must last, whether the partners must reside in the same house, whether the relationship must be of a sexual nature, and when the relationship ends.

We have recognized that administrative efficiency is a legitimate governmental interest.47 There is no doubt that making a less-clearly-defined (compared to spouses) category of persons eligible for employment benefits would create administrative burdens. But Alaskas Equal Protection Clause requires more than just a rational connection between a classification and a governmental interest; even at the lowest level of scrutiny, the connection must be substantial.48

It is significant that other agencies, political subdivisions, and states provide, or have provided, employment benefits to their employees same-sex domestic partners. The state does not dispute the plaintiffs contention that the University of Alaska does or did so and that it opted qualifying criteria.49 Likewise, other states50 and municipalities,51 including the City and Borough of Juneau,52 offer the same health benefits to domestic partners, per their eligibility standards, that they offer to married couples.

We do not assume, as plaintiffs assert, that the state and the municipality can simply adopt the methodology the University of Alaska adopted to administer its programs. The state has many more employees than the university. Nonetheless, that many other agencies, municipalities, and states offer employment benefits to their employees same-sex domestic partners suggests that the governments legitimate administrative concerns can be satisfied. The availability of these benefits elsewhere persuades us that administrative difficulties are not an insurmountable barrier to providing benefits if our constitution requires that they be provided. We therefore conclude that the absolute exclusion of same-sex couples is not substantially related to the goal of maximizing administrative efficiency.

Promotion of marriage. The state and municipality assert that they have a legitimate interest in the promotion of marriage. To support this assertion, the municipality points to the ancient cultural and legal status of marriage and the place of a marriage between one man and one woman as the historic foundation of society. Amicus curiae Alaska Catholic Conference also contends that the promotion of marriage is a legitimate state interest. It cites in support several United States Supreme Court decisions that have recognized the right to marry as involv[ing] interests of basic importance in our society.53 The Supreme Court has also explained that marriage is a social relation subject to the states police power.54

We have never considered whether the promotion of

marriage is a valid governmental interest.

Plaintiffs argue that whether or not the promotion of marriage is a legitimate governmental interest, the state is not truly interested in promoting marriage, because, if it were, it would not have prevented gays and lesbians from entering into married relationships. This argument has little merit. The state rightly argues that just because the legislature did not want to promote same-sex marriage does not mean it did not have a sincere interest in promoting traditional marriage.

Plaintiffs also challenge the legitimacy of any interest in promoting marriage. They argue that the state and municipality may not assert an interest in promoting married relationships for its own sake. They claim that the government may not favor a class simply because it favors the class, and that discrimination is never a legitimate interest. That proposition is certainly correct, but the promotion of marriage in and of itself is not necessarily discriminatory. And it is not irrational. Among other things, it can encourage family stability (an undeniably valid public goal), as the Alaska Catholic Conference argues.

As to this issue, plaintiffs true challenge is to the decision to promote family stability among opposite-sex couples but not among same-sex couples. They argue that the social good from family stability in same-sex relationships is just as important and valuable as the social good from stable opposite-sex relationships. Assuming plaintiffs argument is correct, it would not establish that an interest in promoting marriage is not legitimate. Given the social benefits potentially inherent in marriage and the Supreme Courts statement that marriage is subject to state regulation,55 we conclude that the promotion of marriage is at least a legitimate governmental interest.

We accept the states contention that providing employment benefits to spouses of its employees may encourage persons to marry or stay married. Such benefits are financially valuable and their availability may be an important or even critical factor to persons deciding whether to marry. But the question here is whether the means chosen to advance the interest are substantially related to the governments interest.

The first part of the chosen means providing a benefit to spouses is directly related to advancing the marriage interest. But the second part of the chosen means restricting eligibility to persons in a status that same-sex domestic partners can never achieve cannot be said to be related to that interest. There is no indication here that denying benefits to public employees with same-sex domestic partners has any bearing on who marries. There is no indication here that granting or denying benefits to public employees with same-sex domestic partners causes employees with opposite-sex domestic partners to alter their decisions about whether to marry. There is no indication here that any of the plaintiffs, having been denied these benefits, will now seek opposite-sex partners with an intention of marrying them. And if such changes resulted in sham or unstable marriages entered only to obtain or confer these benefits, they would not seem to advance any valid reasons for promoting marriage. In short, there is no indication that the programs challenged aspect the denial of benefits to all public employees with same-sex domestic partners has any relationship