

clung to the same strategy. And what have we seen for it? We have seen a lower standard of living in this country generally, lower wages, and we have seen American jobs move overseas. That has been the result of this strategy. It is a strategy that hurts this country, and it is a strategy that must be changed.

We must get to a point where, if you close your eyes and simply listen, you can hear a difference between what people are saying on trade policy. You cannot anymore. There is no difference between what the Republicans say and what the Democrats say on trade. It sounds all the same to me.

Oh, Senator HOLLINGS sounds different to me because he is talking a different kind of strategy—plus he comes from a different part of the country. And Senator BYRD sounds different because he is talking about trade in a completely different way. But it is very unusual, and we need to create a national debate on this subject. We need to do it soon. The merchandise trade deficit last year was \$166 billion, the highest in history. Jobs left our country. Wages in this country were down.

Our current strategy says to American workers they can now compete with 2 or 3 billion others in the world, some of whom are willing to work for 12 cents an hour at the age of 12, for 12 hours a day. That ought not be the competition for the American worker. No one should produce a product that enters our marketplace under those conditions. And we must, posthaste, create a national debate about trade strategy, looking out for the best interests of this country.

I do not want a trade war. That does not serve anybody's interests. But I do want our country to stand up for its own economic interests for a change. Can we not, for a change, just for once, have a trade negotiation that we win, or at least come out even on? We lose every time we pull up to the table. We lost on NAFTA; we lost on Canada; we lost on GATT. We can go all the way back. It is time for this country to stand up for its economic interests.

#### MEDICARE AND TAX CUTS FOR THE RICH

Mr. DORGAN. I did not come to speak about trade, but I wanted to say something about what I saw this weekend—the Speaker of the House, the majority leader of the Senate, and now today I see the chairman of the Ways and Means Committee of the other body, all talking about Medicare.

It was interesting to me. I was thinking about these old movies I used to see when I was a kid, when all these cowboys would whistle when they go into a box canyon and then when the trouble would start, they would start jumping off their horses, trying to find a place to hide.

This is kind of a box canyon we have created in the last couple of months,

just riding in, whistling all the way, with the Contract With America, saying: Do you know what we can do? We can balance the Federal budget easily. We can do it before lunch. We will not even break a sweat. We will just change the U.S. Constitution and use \$1.3 trillion in the Social Security trust funds to offset against other revenues. We will balance the budget.

Plus we will do more than that. We will promise you American people we will not only balance the budget, we will give you a tax cut. In fact, we will call it a middle-class tax cut. We will do all of that, and we will tame this Medicare and Medicaid problem. We will cut money out of Medicare and Medicaid and we will solve that problem.

Then what happened? I think this weekend somehow these folks that rode into this box canyon understood the trouble they were in because, all of a sudden, the three dismounted and are scurrying in every direction.

I noticed today the Ways and Means Committee in the House was asking the administration to give them advice on how to solve the Medicare and Medicaid problem. They were not asking for any advice when they talked about the tax cut bill or the welfare reform bill that they moved through there quickly. They did not need any advice then. But all of a sudden they find out their promises are coming home to pinch. What they are worried about is that the American people might see what has been created—a promise of tax cuts for the middle class that looks like this:

This is the middle-class tax cut for those middle-class folks who live on Rodeo Drive. At least it must be Rodeo Drive because how else could you explain this chart? Who benefits from the tax bill? If you earn \$30,000 or below, as an average family, you get an enormous tax cut, \$134 a year. If your income is \$200,000 or above as an American family, you get a check back for your tax bill, a tax cut of \$11,266.

I was on a radio talk show with a conservative host, somebody who believes in all of this, who said, "Well, Senator DORGAN, what do you think about this middle-income tax cut?" I said, "What middle-income tax cut? What on Earth are you talking about?" He said, "The one just passed by the House of Representatives which benefits the middle-income folks." I said, "Really? Do you understand it? Have you really seen the results of it?" I said, "If you are over \$200,000, you get a \$11,200 tax break; \$30,000 or under, you get \$134. That is middle income?" Not in my hometown, it is not middle income.

But you know what has happened here. You know what the box canyon is—people are going to look and say, "Gee. Now if we have a big deficit and we have economic troubles in our country and we are trying to reduce the budget deficit and give a \$11,200 tax cut to families over \$200,000 a year, and

then the same folks who want to do it come along and say, "Do you know how we can pay for all of this? We can take a \$300 billion or \$400 billion out of Medicare and Medicaid. That is how we can pay for this."

All of a sudden I think a light bulb went on in the minds of some of these architects who said maybe we will get blamed for taking money away from people who are elderly or poor for their health care and using it to give a tax cut to those who are wealthy. Will not that be unfair for those of us who know the facts to stand up and talk about those folks? So all of a sudden we have seen in the last 48 hours, 72 hours, folks scurrying around town here saying, "Wait a second. Do not be so quick on Medicare and Medicaid. That is not really what we meant. That is not what we said."

We do not really know what they mean because those same folks who were out here in an enormous hurry to change the U.S. Constitution were not in a very big hurry on April 1 when the law said they were required to bring a budget to the floor of the Senate.

You see, you cannot change the Constitution and alter the deficit. If you change the Constitution with a constitutional amendment to require a balanced budget, you will not change the deficit by one nickel. What changes the budget deficit is when we bring a budget to the floor and make decisions.

They were in a big hurry to change the Constitution, but somehow this enormous need to move quickly has left them. Now they simply cannot seem to get over here. The law says April 1 they should be here with their budget. Then it says by April 15 we should have a conference report. Well, April 1 came and went. April 15 is here and gone. May 1 is here and gone. No budget. But we have tax cuts for the big folks.

If you make half a million dollars sitting there clipping coupons, using that channel changer to search to see what entertainment is on tonight for you, boy, you can look at this Congress, and, say, "What a Congress. What a bunch of folks those folks are. \$11,000 I have to spend. I can buy some more radio equipment. In fact, I can probably lease a Rolls Royce for 6 or 8 months, or lease a Mercedes Benz." Could you not with \$11,000 lease a Mercedes Benz for a year? Then you say to the person that is making \$20,000 or \$25,000 a year, maybe a hubcap. Maybe you will not be able to afford the hubcap. Maybe a radiator cap, but certainly not the Mercedes Benz we are going to give to the big folks.

Here we are. No budget; got a tax cut, not middle-class tax cut, a tax cut that gives the bulk of the benefits to the wealthiest. It is the old cake and crumbs theory. Give the cake to the big shots. Leave a few crumbs to the rest and say everybody got something.

It is like somebody going to Camden Yards and saying, "You know something. I am going to give away \$100

million in Camden Yards over at the baseball stadium in Baltimore." So everybody files in with great expectations because it is going to be divided up among them. The person goes around to every seat and gives everybody a dollar. But the person sitting behind home plate, seat A, row one, that person gets \$99,999,000—essentially the bulk of the tax cut, the bulk of the giveaway. That is what is happening here, and people understand that.

So we are in a situation now where those of us who look at this contract and the strategy wonder what is real. They say, "I want a balanced budget. I want a balanced budget. I am willing to weigh in and lift for a balanced budget. I am going to propose a container of spending cuts that is real and substantial."

But as I said a couple of months ago, you know, I tuned in once to a television program and saw weight lifting and body building. They had the body building contest where the folks come out and pose. I had never seen this before. They oil themselves up and they come out and flex their muscles. And the announcer said, "In the sport of body building there is a big difference between lifting and posing."

I thought to myself. Gee. That sort of spells the difference in politics. There are a lot of folks who are terrific in posing. They come out here and flex around, get all oiled up, and look pretty and impress everybody. The question then on April 1 is what can you lift? The answer is apparently nothing. This is all posing.

I think all of us here need to understand what the dimensions of the problem are for this country. We have serious dimensions in the problem of Medicare and Medicaid, and we have to resolve it. We have to reform the system. We ought to redress the rate of growth to the extent we can. We ought to do that in a bipartisan way. But nobody that I know of on this side of the aisle believes we ought to provide \$11,000 tax cuts for the people with a couple hundred thousand dollars in income, and then say to the seniors in this country, "We are sorry. We don't have enough money to provide health care for you."

Those are the issues. Is it fair to juxtapose them? It is darned right it is fair. We intend to do that because I think we ought to pass a budget that moves us toward a balanced budget and get rid of these deficits. I think we ought to reform the welfare system. We ought to reduce the rate of growth in Medicare and Medicaid. We should reform the welfare system as well. We ought to reduce the rate of growth in health-care programs.

But we ought not under any circumstance play this kind of a game where we can construct one more bit of evidence of reaching out to the wealthiest in our country and saying, "By the way, let us give you an extra bonus, a little extra appreciation for what you do for America." There is nothing wrong with being wealthy. I think everybody would like to be wealthy. But there are a whole lot of folks in this country who are not wealthy who work and try very hard and also need some help.

I think the help we can give them in this country as a whole is to reduce this crushing budget deficit, do it in an honest way, address the wrenching issues of health care in an omnibus way, but especially with respect to Medicare and Medicaid. If we do that, then I think finally these kinds of things will be believable.

I came today to discuss this only because I have seen the scurrying or the flurry of activity in the last couple of days by our majority leader, and by the Speaker, and by so many others who now say, "Well, it is true we were thinking of several hundred billion dollars in cuts in Medicare and Medicaid but now we want to talk about it in a different context." Why the change? All of us know why the change. Because they understand that even those of us who went to the smallest schools can add and subtract, and when things do not add up, you have to live with the consequences.

This kind of a chart does not add up against the backdrop of those who want to go after Medicare and Medicaid. It does not add up either that those who are most anxious to change the Constitution now somehow seem not anxious at all to bring the budget resolution to the floor of the Senate.

My hope is that in the very near future all of us who care about this can work together and solve these problems together.

You know, I supported, in 1993, a budget resolution that passed this Chamber by one vote, and I have never apologized and never intend to apologize to anybody for voting to do it. I am glad I did. It was the right vote.

The easiest vote and the political vote would have been to vote no, because what we did was we cut some spending, we increased some taxes, and we reduced the deficit.

Nearly half of our Chamber said, "Count me out. I just want to talk about deficit reduction, but when it comes to voting for it, I ain't going to vote for it in a minute, not an hour, not a year." So we did not even get one Republican vote to pass the budget resolution.

So I do not want people in this Chamber wondering whether the Senator from South Carolina or others are willing to balance the budget. We have been willing to cast the difficult votes and live with the consequences. And I am perfectly satisfied with that.

But there is much, much more to do. The next step, and I hope the final step, in getting toward a balanced budget amendment requires, I think, sober, serious budget cuts. It requires us to jettison these kinds of approaches that are called middle-class tax cuts, that really once again reduce the revenues and increase the deficit in order to give tax cuts to the wealthy.

Madam President, I see the Senator from South Carolina is on his feet. Those are the points I wanted to make today about wondering why the budget is not before us, No. 1; and, No. 2, trying to understand a bit, why so much activity in the last 72 hours by leaders of the other party on the Medicare and Medicaid reform issue? I think I understand it. I think they understand it. We will see in the coming days what results from it.

I yield the floor.

Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER (Mr. INHOFE). The Senator from South Carolina.

Mr. HOLLINGS. Mr. President, I want to join in the comments of our distinguished colleague from North Dakota along the line of the difficulty with respect to the budget, and then let me also address Medicare and some of the comments made recently.

I ask unanimous consent that a document released last January on the realities of truth in budgeting be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

HOLLINGS RELEASES REALITIES ON TRUTH IN BUDGETING

Reality No. 1: \$1.2 trillion in spending cuts is necessary.

Reality No. 2: There aren't enough savings in entitlements. Have welfare reform, but a jobs program will cost; savings are questionable. Health reform can and should save some, but slowing growth from 10 to 5 percent doesn't offer enough savings. Social Security won't be cut and will be off-budget again.

Reality No. 3: We should hold the line on the budget on Defense; that would be no savings.

Reality No. 4: Savings must come from freezes and cuts in domestic discretionary spending but that's not enough to stop hemorrhaging interest costs.

Reality No. 5: Taxes are necessary to stop hemorrhage in interest costs.

	1996	1997	1998	1999	2000	2001	2002
Deficit CBO Jan. 1995 (using trust funds) .....	207	224	225	253	284	297	322
Freeze discretionary outlays after 1998 .....	0	0	0	-19	-38	-58	-78
Spending cuts .....	-37	-74	-111	-128	-146	-163	-180
Interest savings .....	-1	-5	-11	-20	-32	-46	-64
Total savings (\$1.2 trillion) .....	-38	-79	-122	-167	-216	-267	-322
Remaining deficit using trust funds .....	169	145	103	86	68	30	0

	1996	1997	1998	1999	2000	2001	2002
Remaining deficit excluding trust funds .....	287	264	222	202	185	149	121
5 percent VAT .....	96	155	172	184	190	196	200
Net deficit excluding trust funds .....	187	97	27	(17)	(54)	(111)	(159)
Gross debt .....	5,142	5,257	5,300	5,305	5,272	5,200	5,091
Average interest rate on debt (percent) .....	7.0	7.1	6.9	6.8	6.7	6.7	6.7
Interest cost on the debt .....	367	370	368	368	366	360	354

Note.—Figures are in billions. Figures don't include the billions necessary for a middle-class tax cut.

Nondefense discretionary spending cuts	1996	1997
Space station .....	2.1	2.1
Eliminate CDBG .....	2.0	2.0
Eliminate low-income home energy assistance .....	1.4	1.5
Eliminate arts funding .....	1.0	1.0
Eliminate funding for campus based aid .....	1.4	1.4
Eliminate funding for impact aid .....	1.0	1.0
Reduce law enforcement funding to control drugs .....	1.5	1.8
Eliminate Federal wastewater grants .....	0.8	1.6
Eliminate SBA loans .....	0.21	0.282
Reduce Federal aid for mass transit .....	0.5	0.1
Eliminate ETA .....	0.02	0.1
Reduce Federal rent subsidies .....	0.1	0.2
Reduce overhead for university research .....	0.2	0.3
Repeal Davis-Bacon .....	0.2	0.5
Reduce State Dept. funding and end misc. activities .....	0.1	0.2
End P.L. 480 title I and III sales .....	0.4	0.6
Eliminate overseas broadcasting .....	0.458	0.570
Eliminate the Bureau of Mines .....	0.1	0.2
Eliminate expansion of rural housing assistance .....	0.1	0.2
Eliminate USITIA .....	0.012	0.16
Eliminate ATP .....	0.1	0.2
Eliminate airport grant in aids .....	0.3	1.0
Eliminate Federal highway demonstration projects .....	0.1	0.3
Eliminate Amtrak subsidies .....	0.4	0.4
Eliminate RDA loan guarantees .....	0.0	0.1
Eliminate Appalachian Regional Commission .....	0.0	0.1
Eliminate untargeted funds for math and science .....	0.1	0.2
Cut Federal salaries by 4 percent .....	4.0	4.0
Charge Federal employees commercial rates for parking .....	0.1	0.1
Reduce agricultural research extension activities .....	0.2	0.2
Cancel advanced solid rocket motor .....	0.3	0.4
Eliminate legal services .....	0.4	0.4
Reduce Federal travel by 30 percent .....	0.4	0.4
Reduce energy funding for Energy Technology Develop. ..	0.2	0.5
Reduce Superfund cleanup costs .....	0.2	0.4
Reduce REA subsidies .....	0.1	0.1
Eliminate postal subsidies for nonprofits .....	0.1	0.1
Reduce NIH funding .....	0.5	1.1
Eliminate Federal Crop Insurance Program .....	0.3	0.3
Reduce Justice State-local assistance grants .....	0.1	0.2
Reduce export-import direct loans .....	0.1	0.2
Eliminate library programs .....	0.1	0.1
Modify Service Contract Act .....	0.2	0.2
Eliminate HUD special purpose grants .....	0.2	0.3
Reduce housing programs .....	0.4	1.0
Eliminate Community Investment Program .....	0.1	0.4
Reduce Strategic Petroleum Program .....	0.1	0.1
Eliminate Senior Community Service Program .....	0.1	0.4
Reduce USDA spending for export marketing .....	0.02	0.02
Reduce maternal and child health grants .....	0.2	0.4
Close veterans hospitals .....	0.1	0.2
Reduce number of political employees .....	0.1	0.1
Reduce management costs for VA health care .....	0.2	0.4
Reduce PMA subsidy .....	0.0	1.2
Reduce below cost timber sales .....	0.0	0.1
Reduce the legislative branch 15 percent .....	0.3	0.3
Eliminate Small Business Development Centers .....	0.056	0.074
Eliminate minority assistance—Score, Small Business Institute and other technical assistance programs, women's business assistance, international trade assistance, empowerment zones .....	0.033	0.046
Eliminate new State Department construction projects ..	0.010	0.023
Eliminate Int'l Boundaries and Water Commission .....	0.013	0.02
Eliminate Asia Foundation .....	0.013	0.015
Eliminate International Fisheries Commission .....	0.015	0.015
Eliminate Arms Control Disarmament Agency .....	0.041	0.054
Eliminate NED .....	0.014	0.034
Eliminate Fulbright and other international exchanges ..	0.119	0.207
Eliminate North-South Center .....	0.002	0.004
Eliminate U.S. contribution to WHO, OAS and other international organizations including the United Nations .....	0.873	0.873
Eliminate participation in U.N. peacekeeping .....	0.533	0.533
Eliminate Byrne grant .....	0.112	0.306
Eliminate Community Policing Program .....	0.286	0.780
Moratorium on new Federal prison construction .....	0.028	0.140
Reduce coast guard 10 percent .....	0.208	0.260
Eliminate Manufacturing Extension Program .....	0.03	0.06
Eliminate coastal zone management .....	0.03	0.06
Eliminate national marine sanctuaries .....	0.007	0.012
Eliminate climate and global change research .....	0.047	0.078
Eliminate national sea grant .....	0.032	0.054
Eliminate State weather modification grant .....	0.002	0.003
Cut weather service operations 10 percent .....	0.031	0.051
Eliminate regional climate centers .....	0.002	0.003
Eliminate Minority Business Development Agency .....	0.022	0.044
Eliminate Public Telecommunications Facilities Program grant .....	0.003	0.016
Eliminate children's educational television .....	0.0	0.002
Eliminate national information infrastructure grant .....	0.001	0.032
Cut Pell grants 20 percent .....	0.250	1.24
Eliminate education research .....	0.042	0.283
Cut Head Start 50 percent .....	0.840	1.8
Eliminate meals and services for the elderly .....	0.335	0.473
Eliminate title II social service block grant .....	2.7	2.8
Eliminate community services block grant .....	0.317	0.470
Eliminate rehabilitation services .....	1.85	2.30
Eliminate vocational education .....	0.176	1.2
Reduce chapter 1 20 percent .....	0.173	1.16
Reduce special education 20 percent .....	0.072	0.480
Eliminate bilingual education .....	0.029	0.196
Eliminate JTPA .....	0.250	4.5

Nondefense discretionary spending cuts	1996	1997
Eliminate child welfare services .....	0.240	0.289
Eliminate CDC Breast Cancer Program .....	0.048	0.089
Eliminate CDC AIDS Control Program .....	0.283	0.525
Eliminate Ryan White AIDS Program .....	0.228	0.468
Eliminate maternal and child health .....	0.246	0.506
Eliminate Family Planning Program .....	0.069	0.143
Eliminate CDC Immunization Program .....	0.168	0.345
Eliminate Tuberculosis Program .....	0.042	0.087
Eliminate agricultural research service .....	0.546	0.656
Reduce WIC 50 percent .....	1.579	1.735
Eliminate TEFAP .....		
Administrative .....	0.024	0.040
Commodities .....	0.025	0.025
Reduce cooperative State research service 20 percent ...	0.044	0.070
Reduce animal plant health inspection service 10 percent ..		
Reduce food safety inspection service 10 percent .....	0.036	0.044
Reduce food safety inspection service 10 percent .....	0.047	0.052
Total .....	36.941	58.402

AMENDMENT INTENDED TO BE PROPOSED BY  
MR. HOLLINGS

At the appropriate place insert the following:

**SEC. . SENSE OF THE SENATE CONCERNING CONGRESSIONAL ENFORCEMENT OF A BALANCED BUDGET.**

It is the Sense of the Senate

(A) that the Congress should move to eliminate the biggest unfunded mandate—interest on the national debt, which drives the increasing federal burden on state and local governments; and

(B) that prior to adopting in the first session of the 104th Congress a joint resolution proposing an amendment to the Constitution requiring a balanced budget—

(1) the Congress set forth specific outlay and revenue changes to achieve a balanced federal budget by the year 2002; and

(2) enforce through the Congressional budget process the requirement to achieve a balanced federal budget by the year 2002.

Mr. HOLLINGS. Mr. President, in this particular document, I went as seriously in purpose as I possibly could to try my dead-level best to do what the contract said.

As you well know, Mr. President, I have voted for and supported a balanced budget. I voted for one in 1968 and 1969. As chairman of the Budget Committee, we cut the deficit materially. I opposed the tax cuts of President Reagan and favored the spending cuts, which was very costly to me politically. But I knew we had to do it. I knew what the problem was.

I, thereupon, recommended a freeze when our friend, Senator Howard Baker, was the majority leader, and we worked on that. I later worked, of course, with Senator GRAMM and Senator RUDMAN on Gramm-Rudman-Hollings, where we sequestered, cut right straight across the board, reduced the deficit for awhile, and fought like a tiger at 12:41 a.m., October 19, 1990, when they repealed Gramm-Rudman-Hollings on that point of order, with Senator GRAMM voting to repeal it. And I have been disillusioned by that.

But I had tried the freeze; I tried the cuts. And then, under President Bush, talking with his OMB Director, Dick Darman, I said to Dick, "If you can get President Bush to go along now, we

will have to have not only the spending cuts, the spending freezes, the elimination of tax loopholes, but we need revenues to get on top of this."

Because I will show in later debate where President Reagan got us the first \$100 billion deficit and the first \$200 billion. President Bush got us the first \$300 billion deficit and the first \$400 billion deficit. And I will show that by actual record.

As I have said, we have to get on top of this monster. I testified before the Finance Committee for a value-added tax. So I put this particular item that I have referred to in the RECORD just once again to justify my capacity and sincerity to talk on this particular point.

Because I listed the very, very difficult task that was confronting us whereby, in a line, you are not going to save that much in entitlements and welfare reform and health reform or Social Security or defense, but rather you are going to have to look for domestic discretionary spending. And to put us on a glidepath that first year, you had to cut \$37 billion in domestic discretionary spending and even then, you would not accomplish it because interest costs grows this year by \$43 billion.

So like "Alice in Wonderland," in order to stay where you are, you have to run as fast as you can; in order to get ahead, you have to run even faster. So it is a far, far more serious problem.

And the talk about tax cuts, that is out of the whole cloth. Everybody likes tax cuts. I joined with Senator FEINGOLD from Wisconsin earlier this year in saying forget about cutting the revenues. The problem is you need revenues, because we have spending on automatic pilot.

I can tell you here and now, irrespective of what they are saying, as we talk this particular day, May 2, 1995, we have spent another \$1 billion. And tomorrow, we will spend another \$1 billion; Thursday, another \$1 billion; and Friday another \$1 billion; and Saturday, another \$1 billion; and Sunday, another \$1 billion, just in interest costs, on automatic pilot.

How do you get on top of this monster? Well, you have to do all the above and, yes, it is going to take bipartisanship and not going to take politics.

I want to make reference now to the statement just made by the Senator from North Dakota about Medicare, because we hear a lot of whooping and wailing about Medicare and, above all, about the President of the United States.

Now, heavens above, if there is one thing—and I think President William Jefferson Clinton has been blamed for everything up here—but if there is one

thing that President Clinton cannot be blamed for, that is any deficit in Medicare-Medicaid. He was back home in Little Rock, AR, when we were up here creating these deficits. So let us not blame the President.

Moreover, let us not blame him since he has come to town. He put this as the No. 1 issue. They are talking about AWOL now. I am going to get to this point. Here is the gentleman they talk about being AWOL. He came to town with health care reform as his No. 1 interest and issue. Along with that, he submitted a cut of \$125 billion. And the then-chairman of our Finance Committee was the distinguished Senator from New York, Senator MOYNIHAN. He described that as fantasy. And Senator PACKWOOD, the ranking member, joined in with him—a \$125 billion cut was fantasy. It just could not be done.

But we worked on it. And we worked on spending cuts. We worked on controlling entitlements, and we worked on tax increases. And, yes, we came up, finally, with a plan that year with all three of them, without a single, single, single Republican vote in either the Senate or the U. S. House of Representatives.

We reduced the deficit some \$500 billion. We eliminated over 100,000 Government jobs. We increased taxes on gasoline, liquor, and cigarettes. We increased taxes even on Social Security. And, finally, we did get an agreement, after hard work, of a \$56 billion cut in Medicare.

Now, remember, in the last 24 hours, we have heard AWOL: The President is AWOL; took a walk; waved the flag of surrender; AWOL.

Here was a President who led and got his Vice President over and all to get the necessary votes so we could get those cuts in Medicare.

Thereupon, the President came last year with another \$80 billion in cuts, along with health care reform, and what did they do? They rebuffed him and beat up on him and ridiculed the First Lady. But she worked, and, agree or disagree, you could not say that Hillary Rodham Clinton was AWOL or that William Jefferson Clinton was AWOL.

Now what they want to do, Mr. President—and this is the interesting thing and I am going to include this in the RECORD—they wanted the President of the United States to do all the dirty work, all the cuts. I want to show you the Dole-Domenici alternative entitled "Because Government, Not People, Should Be the First to Sacrifice." Mr. President, I ask unanimous consent that the Dole-Domenici alternative be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

*The Dole/Domenici Alternative: Because government, not people, should be the first to sacrifice*

Drop all proposed spending additions .....	-\$124
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Drop investment	
Drop stimulus	
Permit new spending if paid for by added spending cuts	
Eliminate proposed taxes .....	- 295
Drop all individual income taxes	
Drop President Clinton's proposed new energy tax	
Drop all business income taxes	
Eliminate Social Security tax increase	
Eliminate all proposed user fees ..	- 18
Accept all proposed mandatory and discretionary cuts .....	- 241
Accept all mandatory savings	
Accept all discretionary savings (Defense and non-Defense)	
Restore \$20 billion in Defense budget .....	+ 20
Specific details await President's budget submission	
Freeze domestic discretionary baseline .....	- 92
Freeze fiscal year 1994 domestic discretionary BA except for increased funding for child immunization and WIC programs (\$500 million in 1994)	
Extend domestic discretionary sequester to enforce freeze and savings	
Revenues:	
Pay for R&E and other investment tax incentives:	
Cap non-Social Security mandatory spending .....	- 93.1
Total non-Social Security mandatory savings: \$177 billion over 5 years	
Cap on Medicare and Medicaid spending (CPI+population+4%)	
Debt savings .....	- 38
Real deficit reduction <sup>2</sup> .....	- 444.2
Sasser assumptions on debt management .....	16.1
Total deficit reduction .....	- 460.4

<sup>1</sup>Numbers are based on CBO capped baseline.

<sup>2</sup>Deficit in 1998 would drop to \$168.4 billion and continue falling into the next century.

Process reform proposals:

Establish discretionary spending caps for defense and non-defense domestic programs. Create fixed deficit targets with enforcement through across the board cuts if targets breached.

Assumes zero-based budgeting to control future spending.

Mr. HOLLINGS. Mr. President, this is the Dole-Domenici alternative budget they put up in March 1993. The language is: "Accept all proposed mandatory and discretionary cuts, \$241 billion." They not only accepted the President's cuts but on top of that they capped non-Social Security mandatory spending—a cap on Medicare and Medicaid. So they could go to the 1994 election and say, "Look at what they have done. The President wants to cut your Medicare."

And in 1994, here is what they had. This one is entitled "GOP Alternative Deficit Reduction and Tax Relief, Slashing the Deficit, Cutting Middle-Class Taxes." Mr. President, I ask unanimous consent to print the GOP alternative in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

*Billions<sup>1</sup>* GOP ALTERNATIVE: DEFICIT REDUCTION AND TAX RELIEF

SLASHING THE DEFICIT, CUTTING MIDDLE CLASS TAXES

The Republican Alternative Budget will reduce the deficit \$318 billion over the next five years—\$287 billion in policy savings and \$31 billion from interest savings. This is \$322 billion more in deficit reduction than the President proposes and \$303 billion more in deficit reduction than the House-passed resolution contains.

Moreover, the GOP alternative budget helps President Clinton achieve two of his most important campaign promises—to cut the deficit in half in four years and provide a middle-class tax cut. The GOP plan:

Reduces the deficit to \$99 billion in 1999. This is \$106 billion less than the 1999 deficit projected under the Clinton budget.

Even under this budget Federal spending will continue to grow.

Total spending would increase from \$1.48 trillion in FY 1995 to more than \$1.7 trillion in FY 1999.

Medicare would grow by 7.8-percent a year rather than the projected 10.6-percent. Medicaid's growth would slow to 8.1-percent annually rather than the projected 12-percent a year growth.

It increases funding for President Clinton's defense request by the \$20 billion shortfall acknowledged by the Pentagon.

Provides promised tax relief to American families and small business:

Provides tax relief to middle-class families by providing a \$500 tax credit for each child in the household. The provision grants needed tax relief to the families of 52 million American children. The tax credit provides a typical family of four \$80 every month for family expenses and savings.

Restores deductibility for interest on student loans—\$21,000 for 25,000.

Indexes capital gains for inflation and allows for capital loss on principal residence.

Creates new incentives for family savings and investments through new IRA proposals that would allow penalty free withdrawals for first time homebuyers, educational and medical expenses.

Establishes new Individual Retirement Account for homemakers.

Extends R&E tax credit for one-year and provides for a one-year exclusion of employer provided educational assistance.

Adjusts depreciation schedules for inflation (neutral cost recovery).

Tax provisions result in total tax cut of \$88 billion over five years.

Fully funds the Senate Crime Bill Trust Fund, providing \$22 billion for anti-crime measures over the next five years. The Clinton budget does not. The House-passed budget does not. The Chairman's mark does not.

Accepts the President's proposed \$113 billion level in nondefense discretionary spending reductions and then secures additional savings by freezing aggregate nondefense spending for five years.

Accepts the President's proposed reductions in the Medicare program and indexes the current \$100 annual Part "B" deductible for inflation. Total Medicare savings would reach \$80 billion over the next five years.

Achieves \$64 billion in Medicaid savings over the next five years, by capping Medicaid payments, reducing and freezing Disproportionate Share Hospital payments at their 1994 level.

Achieves additional savings through reform of our welfare system totaling \$33 billion over the next five years.

Repeals Davis-Bacon, reduces the number of political appointees, reduces overhead expenditures for university research, and

achieves savings from a cap on civilian FTE's.

Mr. HOLLINGS. Mr. President, now we have in March of last year: "Accept the President's proposed reduction in the Medicare program, and index the Part B deductible. Total Medicare savings would reach \$80 billion over the next 5 years."

So there is a conscious awareness in the distinguished majority leader when he talks of the President being AWOL on Medicare. Rather than being AWOL, he has been wounded in the front lines while these others have been all back in the barracks and not even attending the battle. In fact, back in the barracks, the cattle call was what we needed was portability so you can carry your coverage from job to job—a little bit of this, that and the other, just some minor adjustments—why is there all this problem, there is no real problem in medical coverage in America.

Now it is a crisis. When? In 2002. I am trying to get by tomorrow. I am trying to stop spending a billion dollars a day today, tomorrow, and the next day. If I can stop doing that, I can get on top of the problems in the year 2002. But to come forward at this particular time and run all over the national TV talking about taking a walk and going AWOL when the poor fellow has been ground into the ground, he has been totally rebuffed. He has tried and fought the good fight. So now they come with all of this "Let's have bipartisanship." They would not give us a single vote, and now they want to get bipartisan, now they want to get commissions, now we are AWOL because we are ready to try to put the truth to their so-called contract.

The rubber is now meeting the road, and if you look at that contract, Mr. President, talking about Medicare and AWOL, who shoots the troops out there on the front line, the Medicare troops? The contract does, for the simple reason that we in raising Social Security taxes—and this Senator voted to raise Social Security taxes—we raised 25 billion bucks and allocated it to Medicare.

And what does the contract call for? Abolish that tax and not give the \$25 billion, rather let us shoot the Medicare troops and add to the Medicare deficit.

Do not come with your contract and tell me how serious you are about this deficit and all the costs of Medicare. Then you say, oh, by the way, that problem that the President said for 2 years was the principal cause of the deficit and you shot him down, the President is AWOL. You know it. It was adopted momentarily by the distinguished majority leader, because one of these alternatives says "the GOP alternative," and I take it the majority of the GOP certainly was for it in March of last year. It is in the RECORD. Read it. And now you say that the President is AWOL, he does not even know the problem and he will not

come front and center. He has used good common sense, as they call it, commonsense budgets, or whatever is supposed to be common sense around here. He used common sense on this one.

He has tried and fought the good fight. But to be accused, of all things, of being AWOL when they come with a contract trying to increase the Medicare deficit some 25 billion bucks and saying those who have led the fight since they have been in office and never caused any of it are AWOL. The President has been in the front lines leading the battle and fighting the fight.

My suggestion is they get out of the barracks and get out there on the line themselves and put out the full meaning of their so-called deficit reduction package.

On that score, I have been the chairman of the Budget Committee, and I have been the ranking member of the Budget Committee. I have worked on it since 1974, the only remaining Member of either the House or the Senate who has been on it all that time. And I can tell you here and now, in trying to get prompt consideration so the authorizing committees would know what to do and how to do it, we finally put into law that you had the budget out of the committee by April 1 and passed the Senate and passed both Houses by April 15 the concurrent resolution.

As of this minute, we have not met to discuss—we had some cursory hearings the first of the year—but we have not met in 2 months on this budget. They do not even call a meeting. They do not call a discussion. And yet they have the audacity to run around here as leaders and talk about people being AWOL on Medicare and Medicaid.

We have done our best, and we will continue to do our best. But if they want to get any kind of following, they are not going to get any following out of this Senator as long as they continue these political shenanigans. They know it and everybody else knows it. I hope the press will report it, because that is all they do now. They treat it like a spectator sport up here and just avoid dealing with the real issue.

I have pointed out the virtual impossibility of attaining—what Chairman KASICH says on the other side—a balanced budget by the year 2002 without taxes. They can be put on notice, now that I am speaking, that I will join with them on any plan they have so long as it includes revenue.

The reason I say that is because I have tried it every other way—and I am not dumb enough now, having struggled with this thing for 20 years on the Budget Committee with half a haircut. I do not want a little bit here in cuts and a little bit here and a half-way going there and saying, oh, we are going to save \$170 billion in interest costs by 2002 and give \$170 billion over to the Finance Committee so they can give a middle class tax cut, and beginning to play politics that way. We do

not have the money. We are borrowing every day to keep this Government going. They put a bunch of numbers down on paper, then they all wink at each other and say, "Well, who is going to be here in 2002?"

We can project it just as economists have projected it. We can put it down in black and white when we all know differently. If you are going for a real budget deficit reduction, by having the Government operating in the black by the year 2002, you have my vote. We will give, and take, all the way around because I am committed to the spending cuts and what have you, but not overall, unless you are going to agree to have the revenues. I put in a 5 percent value added tax because it is needed. But you have to have substantial revenues and not tax cuts for middle class and capital gains and family cuts and all these other kinds of things that they have in, just to buy the 1996 election. No half a haircut for me. If you want to have truth in budgeting, then you have my cooperation and vote. But if you are going to have a half truth, which is worse than any at all, a half a haircut, keep it yourself and get it passed by yourself.

Now, Mr. President, I have quite a bit to say with respect to punitive damages, because there have been more than enough articles written on this particular score. Let me ask at this point that we have printed in the RECORD an article by Thomas Lambert with respect to punitive damages, outlining, if you please, the various cases that are brought about safety in America. It is an article of some years ago. I ask unanimous consent that it be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

SUING FOR SAFETY

(By Thomas F. Lambert, Jr.)

It has been well and truly said, "If you would plant for a year, plant grain; for a decade, plant trees; but if you would plant for eternity, educate a man." For nearly four generations, ATLA has been teaching its men and women, and they have been demonstrating to one another, that you can sue for safety. Indeed, one of the most practical measures for cutting down accidents and injuries in the field of product failure is a successful lawsuit against the supplier of the flawed product. Here, as well as elsewhere in Tort Law, immunity breeds irresponsibility while liability induces the taking of preventive vigilance. The best way to make a merchant responsible is to make him accountable for harms caused by his defective products. The responsible merchant is the answerable merchant.

Harm is the tort signature. The primary aim of Tort Law, of the civil liability system, is compensation for harm. Tort Law also has a secondary, auxiliary and supportive function—the accident prevention function or prophylactic purpose of tort law—sometimes called the deterrent or admonitory function. Accident prevention, of course, is even better than accident compensation, an insight leading to ATLA's longstanding credo: "A Fence at the Top of the Cliff Is Better Than an Ambulance in the Valley Below."

As trial lawyers say, however, "If you would fortify, specify." The proposition that you can sue for safety is readily demonstrable because it is laced and leavened with specificities. They swarm as easily to mind as leaves to the trees.

ACCIDENT PREVENTION THROUGH SUCCESSFUL SUITS IN THE PRODUCTS LIABILITY FIELD

(1) Case of the Charcoal Briquets Causing Death from Carbon Monoxide. Liability was imposed on the manufacturer of charcoal briquets for the carbon monoxide death and injury of young men who used the briquets indoors to heat an unvented mountain cabin. The 10-pound bags read, "Quick to Give Off Heat" and "Ideal for Cooking in or Out of Doors." The manufacturer was guilty of failure to warn of a lethal latent danger. Any misuse of the product was foreseeable because it was virtually invited. Next time you stop in at the local supermarket or hardware store, glance at the label on the bags of charcoal briquets. In large capital letters you will find the following: "WARNING. DO NOT USE FOR INDOOR HEATING OR COOKING UNLESS VENTILATION IS PROVIDED FOR EXHAUSTING FUMES TO OUTSIDE. TOXIC FUMES MAY ACCUMULATE AND CAUSE DEATH." Liability here inspired and exacted a harder, more emphatic warning, once again reducing the level of excessive preventable danger.

(2) Case of the Exploding Cans of Drano. When granular Drano is combined with water, its caustic soda interacts with aluminum, another ingredient in its formula and produces intensive heat, converting any water into steam at a rapid rate. If the mixture is confined, the pressure builds up until an explosion results. The manufacturer's use of a screw-on top in the teeth of such well known hazard was a design for tragedy. The expectable came to pass (as is the fashion with expectability). In *Moore v. Jewel Tea Co.*, a 48-year-old housewife suffered total blindness from the explosion of a Drano can with a screw-on top, eventuating in a \$900,000 compensatory and \$10,000 punitive award to the wife and a \$20,000 award to her husband for loss of conjugal fellowship.

A high school chemistry student could see that what was needed was a "flip top" or "snap cap" designed to come off at a pressure of, say, 15-20 pounds per square inch. After a series of adverse judgments, the manufacturer substituted the safer flip top. Of course, even the Drano flip top will be marked for failure if not accompanied by adequate testing and quality control. Capers involved a suit for irreversible blindness suffered by 10-year-old Joe Capers when the redesigned flip top of a can of Drano failed to snap off when the can fell into the bathtub and the caustic contents spurted 8½ feet high impacting Joe in the face and eyes with resulting total blindness. The shortcomings in testing the can with the reformulated design cost the company an award of \$805,000. As a great Torts scholar has said, "Defective products should be scrapped in the factory, not dodged in the home."

*Drayton v. Jiffie Chemical Corp.*, is a grim and striking companion case to the Drano decisions mentioned above, and it underscores the same engineering verities of those cases: the place to design out dangers is on the drawing boards or when prescribing the chemical formula. A one-year-old black girl suffered horrendous facial injuries, "saponification" or fusion of her facial features, when an uncapped container of Liquid-Plumr was inadvertently tipped over. At the time of the accident, this excessively and unnecessarily caustic drain cleaner was composed of 26 percent sodium hydroxide, i.e., lye. No antidote existed because, as the manufacturer knew. Liquid-Plumr would dissolve

human tissue in a fraction of a second. To a child (or any human being) a chemical bath of the drain cleaner could be as disfiguring as falling into a pool of piranha fish. Liquid-Plumr, mind you was a household product, which means that its expectable environment of use must contemplate the "patter of little feet" as the children's hour in the American home encompasses 24 hours of the day.

At the time of marketing this highly caustic drain cleaner, having made no tests as to its effect on human tissue within the existing state of the art, the defendant could have reformulated the design to use 5 percent potassium hydroxide which would have been less expensive, just as effective and much safer. After some 59 other Liquid-Plumr injuries were reported to defendant, it finally reformulated its design to produce a safer product. In *Drayton* the defendant was allowed to argue in defense and mitigation that its management was new, that it had learned from its prior claims and litigation experience and that it had purged the enterprise of its prior egregious misconduct.

To open the courtroom door is often to open a school door for predatory producers.

(3) Case of the Tip-Over Steam Vaporizer. A tip-over steam vaporizer true to that ominous description was upset by a little girl who tripped over the unit's electric outlet cord on the way to the bathroom in the middle of the night. The sudden spillage of scalding water in the vaporizer's glass jar severely burned the 3-year old child. The worst injuries in the world are burn injuries. The cause of the catastrophe was a loose-lidded top which could have been eliminated by adopting any one of several accessible, safe, practical, available, desirable and feasible design alternatives, such as a screw-on or child guard top. The truth is that the manufacturer, Hanksraft, had experienced a dozen prior similar disasters. In the instant case, the little girl recovered a \$150,000 judgment against the heedless manufacturer, impeaching the vaporizer's design because of lack of screw-on or child-guard top. When the manufacturer, with icy indifference to the serious risks to infant users of its household product, refused to take its liability carrier's advice to recall and redesign its loose-lidded vaporizer, persisting in its stubborn refusal when over 100 claims had been filed against it, the carrier finally balked and refused to continue coverage unless the company would recall and redesign. Then and only then did Hanksraft stir itself to redeem and correct the faulty design of its product, thereafter proudly proclaiming (and I quote), "Cover-lock top protects against sudden spillage if accidentally tipped." Once again Tort Law had to play professor and policeman and teach another manufacturer that safety does not cost: It pays. Under what might be called the Cost-Cost formula, the manufacturer will add safety features when it comes to understand that the cost of accidents is greater than the cost of their prevention. The Tip-Over Steam Vaporizer case is the most graphic example known to us showing that corporate management can be recalled to its social responsibilities by threat of stringent liability, enhanced by deserved civil punishment via punitive damages, and that belief in such a proposition is more than an ivory tower illusion.

A good companion case to the Tip-Over-Steam-Vaporizer case, serving the same Tort Touchstone of Deterrence, is the supremely instructive Case of the Remington Mohawk 600 Rifle. While a 14-year-old boy was seeking to unload one of these rifles, pushing the safety to the "off" position as required for the purpose, the rifle discharged with the bullet entering the boy's father's back, leaving him paralyzed and near death for a long

time. The agony of his guilt, his feeling that he was to blame for his father's devastating injuries, pressed down on the boy's brow like a crown of thorns and almost unhinged his sanity. Assiduous investigation by the family's lawyer unearthed expert evidence of unsafe design and construction and lax quality control of the safety selector and trigger assemblies of the Mohawk 600.

The result of the exertions of the plaintiff's lawyer, deeply and redoubtably involved in challenging the safety history of the rifle model, was a capitulation by Remington and an agreement to settle the father's claim (he was a seasoned and successful defense trial lawyer) for \$6.8 million. Remington also wrote the son a letter, muting some of his anguish by stating that the weapon was the whole problem and that he was in no way responsible for his father's injuries. Then, facing the threat of cancelled coverage from its carriers for skyrocketing premiums in the projection of other multi-million dollar awards, Remington commendably served the public interest by announcing the recall campaign in which we see another electrifying example of Tort Law litigating another hazardous product feature from the market.

Remington's nationwide recall program affected 200,000 firearms; notices in newspapers and magazines similar to this one that appeared in the January 1979 issue of *Field and Stream* cut back on the harvest of hurt and heartbreak: "IMPORTANT MESSAGE TO OWNERS OF REMINGTON MODEL 600 and 660 RIFLES, MOHAWK 600 RIFLES, AND XP-100 PISTOLS. Under certain unusual circumstances, the safety selector and trigger of these firearms could be manipulated in a way that could result in accidental discharge. The installation of a new trigger assembly will remedy this situation. Remington is therefore recalling all Model 600 rifles except those with a serial number starting with an 'A'. . . Remington recommends that prior to any further usage of guns included in the recall, they be inspected and modified if necessary. [Directions are then given for obtaining name and address of nearest Remington Recommended Gunsmith who would perform the inspection and modification service free of charge.]"

Tort Law forced Remington to look down the barrel and see what it was up against. Once again Tort Law was the death knell to excessive preventable danger.

For a wonderfully absorbing account of *The Mohawk 600*, see *Stuart M. Speiser's* justly praised *Lawsuit* (Horizon Press, New York, 1980) 348-55.

(4) Case of MER/29, the Anti-Cholesterol Drug Which Turned out to Cause Cataracts. Many trial lawyers will recall the prescription drug MER 29 marketed for its benign and benevolent effect in lowering blood cholesterol levels and treating hardening of the arteries but which turned out to have an unpleasant and unbargained for effect on users, the risk of causing cataracts. As Peter DeVries recently observed, "There is nothing like a calamity to help us fight our troubles." Blatant fraud and suppression of evidence from animal experiments were proved on the manufacturer's part in the marketing of this dangerous drug. Who did more—the federal government or private trial lawyers—in getting this dangerous drug off the market and compensating the numerous victims left in its wake? The question carries its own answer. The United States drug industry has annual sales of 16 billion dollars per year, while the Food and Drug Administration has an annual budget of 65 million dollars to oversee all drug manufacture, production and safety. How can the foothills keep the Alps under surveillance? Worse, as shown by the MER/29 experience, enforcement of the



law in that situation, far from being vigorous and vigilant, was lame, limp and lackluster. It was only private suits advanced by trial lawyers that furnished the real muscle of enforcement and sanction, compensation for victims, deterrence of wrongdoing, and discouragement of corporate attitudes toward the public recalling that attributed to Commodore Vanderbilt.

As to the indispensable role and mission of the trial lawyer in Suing for Safety, it should not be overlooked that the current Administration has moved to sharply restrict the regulation of product safety by the Consumer Product Safety Commission. The 1982 Budget for the commission was reduced by 30 percent in the first round of Reagan Administration budget cuts and is marked for further cuts in the future.

As the Thalidomide, MER/29, Dalkon Shield, Asbestos, DES, Slip-into-Reverse Transmissions and Fuel Tank scandals have been starkly revealed, we have crime in the suites as well as crime in the streets. Corporate culpability calls for corporate accountability, and our society has developed no better instrument to encourage socially responsible corporate behavior than the vehicle of adverse judgments beefed up by punitive damages. In the MER/29 situation, for example, the criminal fines levied on the corporate producer and its executives were slap-on-the-wrist trivial when contrasted with the deterrent impact of punitive damage awards in current uncrashworthiness cases where flagrant corporate indifference to public safety was established.

Our leading scholar in the field of punitive damages, writing with verve and virtuosity on that subject, concluded in 1976 that punitive damages awards should be permitted in appropriate products liability cases. Writing in 1982 with the same unbeatable authority, Professor David G. Owen traces the ferment and developments of doctrine in the ensuing years and then delivers a conclusion informed by exhaustive research, seasoned reflection, and an obvious morality of mind. "I remain convinced of the need to retain this tool of legal control over corporate abuses."

(5) Case of the Infant Who Died from Drinking Toxic Furniture Polish Where Manufacturer Failed to Warn Mother to Keep Toxic Product out of Reach of Children. This is the celebrated case of Spruill v. Boyle-Midway, Inc., in which a 14-month old child reached over from his crib and pulled a doily off a bureau, causing a bottle of Old English Red Oil Furniture Polish, manufactured by the defendant, to fall into the toddler's crib. During the few minutes his mother was out of the room, the baby got the cap off the bottle and drank a little bit of the polish. He was dead within two days of resulting chemical pneumonia. The bottle had a separate warning about combustibility in letters  $\frac{1}{8}$  inch high, but only in the midst of other text entitled "Directions" in letters  $\frac{1}{32}$  inch high did it say "contains refined petroleum distillates. May be harmful if swallowed, especially by children." The mother testified that she saw the warning about combustibility but did not read the directions because she knew how to use furniture polish. In a negligence action against the maker, the jury found that both defendant and the baby's mother were negligent and awarded wrongful death damages to the child's father and siblings but not to the mother. The Fourth Circuit in keeping with the grain of modern authority held that it was irrelevant that the child's ingestion of the toxic polish was an unintended use of the product. The jury could properly find that in the absence of an adequate warning to the mother that she could read and heed—to keep the polish out of the reach of children—such misuse of

the product was a foreseeable one. The defect was to be tested not only by intended uses but by foreseeable misuses.

The jury could find that the manufacturer's placement of the warning was designed more to conceal than reveal, especially in view of the greater prominence given the fire warning  $\frac{1}{8}$  of an inch compared to the Lilliputian print,  $\frac{1}{32}$  of an inch, as to the contents containing "refined petroleum distillates". The poison warning could be found to fall short of what was required to convey to the average person the dangerous nature of this household product. The label suggested that harm from drinking the polish was not certain but merely possible, while experts on both sides agreed that a single teaspoon would be lethal to children.

The warning in short could properly be found to be inadequate—too soft, mispositioned and not sufficiently eye arresting. Defendant admitted in answer to interrogatories that it knew of 32 prior cases of poisoning from ingestion of its "Old English Red Polish."

Did the imposition of liability in this seminal Spruill case supra stimulate, goad or spur the manufacturer to take safety measures against the foreseeable risk of ingestion by innocent children? A trip to the local hardware store a couple of days ago reveals that Old English Red Oil Polish now sports the following on its label: "DANGER HARMFUL OR FATAL IF SWALLOWED. COMBUSTIBLE. KEEP OUT OF REACH OF CHILDREN. SAFETY CAP."

An error is not a mistake unless you refuse to correct it.

(6) Case Holding Manufacturer of PAM (Intended to Keep Food from Sticking to Cooking Surfaces) Liable for Death of Teen-Ager from Inhalation of PAM's Concentrated Vapors. Harless v. Boyle Midway Div. of Amer. Home Products, involved an increasing number of teenagers who were dying of a "glue-sniffing syndrome," inhaling the concentrated vapors of PAM, a household product intended to keep food from sticking to cooking surfaces. Originally, the manufacturer used only a soft warning on the can's label: "Avoid direct inhalation of concentrated vapors. Keep out of the reach of children." However, to the knowledge of defendant, the children continued sniffing and dying. Then the manufacturer, as an increasing number of lawsuits were pressed upon it for the preventable deaths of such children, changed the warning on its label, shifting to a harder warning: "CAUTION: Use only as directed, intentional misuse by deliberately concentrating and inhaling the contents can be fatal." This was, of course, a much harder and more emphatic warning. The Fifth Circuit held that it was reversible error to exclude plaintiff's evidence (in an action for the wrongful death of a PAM-sniffing 14-year-old) that no deaths had occurred from PAM sniffing after the defendant had hardened its warning by warning against the danger of death, the ultimate trauma.

On remand the jury brought in a verdict for the boy's estate in the amount of \$585,000 with an additional finding by the jury that the lad's administrator was entitled to an award of punitive damages. Prior to the punitive damages suit, the case was settled for a total of \$1.25 million. It was uncontested that prior to the lad's death the manufacturer knew of 45 inhalation deaths from foreseeable misuse of its product, and upon remand admitted to an additional 68 from the same expectable cause.

If you will examine the label on the can of PAM on your shelf, as the writer has just done, you will find: "WARNING USE ONLY AS DIRECTED, INTENTIONAL MISUSE BY DELIBERATELY CONCENTRATING AND INHALING THE CONTENTS CAN BE HARM-

FUL OR FATAL." Once again the pressures of liability, stimulated a producer to avoid excessive preventable dangers in its product's use by strengthening its warning label, thereby enhancing consumer protection.

(7) Case of the Poisonous Insecticide Holding That Warnings Must Contain Appropriate Symbols, Such as Skull and Crossbones, Where Manufacturer Knows That Product May Be Used by Illiterate Workers (Spanish-Speaking Imported Puerto Rican Laborers) Who Would Not Understand English. This is the salutary holding in the celebrated case of Hubbard-Hall Chem. Co. v. Silverman. The First Circuit upheld judgments entered on jury verdicts for the wrongful death of two illiterate migrant farm workers who were impoiled by a Massachusetts tobacco farmer and killed by contact with a highly toxic insecticide manufactured and distributed by defendant. Even though the comprehensive and detailed danger warnings on the sacks fully complied with label requirements of the Department of Agriculture, the jury could properly find that because of the lack of a skull or crossbones or other comparable symbols the warning was inadequate. Use of the admittedly dangerous product by persons who were of limited education and reading ability was within the range of apprehension of the manufacturer. While evidence of compliance with governmental regulations was admissible, it was not decisive. Governmental standards are "minimums," a floor not a ceiling, and so far as adequate precautions are concerned, federal regulations do not oust the possibly higher common-law standards of the Commonwealth of Massachusetts.

The steady, unflagging pressures of litigation against the inertia, complacency and moral obtuseness of manufacturers have not only resulted in enhanced safety in the field of conscious design choices (substituting child-guard screw-on tops on tip-over steam vaporizers or over-the-axle fuel tanks for those mispositioned more vulnerably in front of the axle or adding rear-view mirrors to blind behemoth earth-moving machines whose design obstructs the vision of a reversing operator, etc.) but also in inducing product suppliers to reduce marketing defects in the products they sell by strengthening the adequacy of the instructions and warnings that accompany their products set afloat in the stream of commerce.

The net affect of such benign and beneficial litigation has been to improve the adequacy and efficacy of the educational information given to consumers by producers via improvements in the conspicuousness of warnings given; making them more prominent, eye-arresting, comprehensive, complete and emphatic; placing the warnings in more effective locations; avoiding ambiguous warnings; extending warnings to the safe disposition of the product; and avoiding any dilution of the warnings given. In short, the bottom line, as indicated in the cited representative sampling of cases, is that successful lawsuits operate as safety incentives to "inspire" product suppliers to furnish instructions and warnings that are in ratio to the risk and in proportion to the perils attending foreseeable uses of the marketed products.

Here, too, we see the conspicuous usefulness of the lawsuit as the weapon for ferreting out marketing defects, whether ingenious or ingenuous, in selling dangerously defective products.

(8) Case of Marketing Carbon Tetrochloride Using Warnings Found to Be Inadequate Because Inconspicuous. Suppose a defendant sells carbon tetrachloride and places on all four sides of the can, in large letters, the words "Safety Kleen," and then uses small

letters (Lilliputian print) to warn of the serious risk of using the cleaning fluid in an unventilated place for places the fine print warning only on the bottom of the can). It requires no tongue of prophecy to predict that this warning will be found inadequate because too inconspicuous. It was so held in *Maize v. Atlantic Refining Co.* Not only was the warning inadequate because not conspicuous enough, but the representation of safety ("Safety Kleen") operated to dilute, weaken, and counteract the warning. Moreover in *Tampa Drug Co. v. Wait*, the court upheld a judgment for the wrongful death of a 38-year-old husband who died from carbon tetrachloride poisoning after using a jug of the product to clean the floors of his home. While the label warned that the vapor from the liquid was harmful and that prolonged breathing of it or repeated contact with the skin should be avoided and that the product should only be used in well ventilated areas, the court with laser-beam accuracy ruled that the warning nonetheless could be found inadequate because of its failure to warn with qualitative sufficiency as to deadly effects or fatal potentialities which might follow from exposure to its fumes.

Decisions such as *Maize* and *Wait* supra were the prologue and predicate for the action taken by the FDA in 1970, under the Federal Hazardous Substances Act, to ban and outlaw carbon tetrachloride.

Torts archivists know that successful private lawsuits to recover for harm from products simply too dangerous to be sold at all, regardless of the completeness or urgency of the warning given, frequently lead to a recall and reformulation of the product's design or to a decision to ban the product from the market. Life and limb are too important to trade off against unmarketed inventory.

(9) Case of the 8-Year-Old Boy Who Choked to Death from Strangling on a Quarter-Inch Rubber Rivet, Part of a Riviton Toy Kit Given Him for Christmas. This case will indeed rivet the attention (in the sense of attract, fasten and hold) of concerned citizens who wish to understand how the threat of liability operates as a spur to safety on the part of product producers. The present example involves a toymaker whose work is indeed "child's play."

Parker Brothers, a General Mills subsidiary headquartered some 18 miles north of Boston, had big plans for Riviton. This was a toy kit consisting of plastic parts, rubber rivets and a riveting tool with which overjoyed children could put together anything from a windmill to an airplane. In the first year on the market in 1977, the Riviton set seemed on its way to becoming one of those classic toys that parents will buy everlastingly. However, one of the 450,000 Riviton sets bought in 1977 ended up under the Christmas tree of an 8-year-old boy in Menomonee Falls, Wis. He played with it daily for three weeks. Then he put one of the quarter-inch long rubber rivets into his mouth and choked to death. Ten months later, with Riviton sales well on their way to an expected \$8.5 million for the year, a second child strangled on a rivet.

What should the company do? Just shrug off the two fatal child strangulations, ascribe the deaths to freakish mischance, try to shift the blame to parental failure to supervise and police their children at play, or assign responsibility to the child's abnormal misuse or abuse of their product? Could not the company cap its disavowal of responsibility by a bormidic disclaimer that, "After all, peanuts are the greatest cause of strangulation among children and nobody advocates the banning of the peanut."?

However, as manufacturers, Parker Brothers well knew that they would be held liable to an expert's skill and knowledge in the

particular business of toymaking and were bound to keep reasonably abreast of scientific knowledge, discoveries and hazards associated with toys in their expectable environment of use by unsupervised children in the home. The toymaker knew that the Riviton set must be so designed and accompanied by proper instructions and warnings that its parts would be reasonably safe for purposes for which it was intended but also for other uses which, in the hands of the inexperienced, impulsive and artless children, were reasonably foreseeable. When you manufacture for children, you produce for the improvident, the impetuous, the irresponsible. As a seasoned judge put it: "The concept of a prudent child, God forbid, is a grotesque combination." Much must be expected from children not to be anticipated when you are dealing with adults, especially the propensity of children to put dangerous or toxic or air-stopping objects into their mouths. The motto of childhood seems to be: "When in doubt, eat it." Knowledge of such childish propensity is imputed to all manufacturers who produce products, especially toys, which are intended for the use of or exposure to children. Cases abound to document this axiom.

Recently, Wham-O Manufacturing Co. of San Gabriel, Calif., voluntarily recalled its Water Wiggle, a garden hose attachment that drowned a child when it jammed in its throat. Still more recently, Mattel, Inc. of Hawthorne, Calif., initiated a recall of missiles fired by its Battlestar Gallactica toys when a 4-year-old boy inhaled one and died. The manufacturer of a "Play Family" set of toy figurines would have been well advised to pull from the market and redesign the small carved and molded figures in the toy set, intended for children of the teething age. A 14-month-old child swallowed one of the toy figures 1 $\frac{3}{4}$ " high and  $\frac{7}{8}$ " in diameter, and before it could be extricated from his throat at a hospital's emergency room, the child was reduced to vegetable status as a result of irreversible brain damage from the toy's wind-pipe blockage of air supply to the brain. The manufacturer's dereliction of design and lack of product testing were to cost it a \$3.1 million jury verdict for the child and his parents.

Against the marketing milieu and the legal setting sketched above, what should be the proper response of Parker Brothers, manufacturers of the Riviton toy set, when its executives learned of the second child's death from strangulation on the quarter-inch rubber rivet in the toy kit? Should they have tried to tough it out or luck it out in the well known lottery "do nothing and wait and see"? The company was sensitive not only to the constraints of the law (liability follows the marketing of defective products), but also to the imperatives of moral duty and social responsibility, and the commercial value of an untarnished public image. Parker Brothers decided to halt sales and recall the toy. As the company president succinctly stated, "Were we supposed to sit back and wait for death No. 3?"

Business, the Frenchman observed, is a combination of war and sport. Tort Law pressures business to realize how profitless it may prove to war against children or to trifle and jest with their safety. The commendable conduct of Parker Brothers in this case is one of the most striking tributes we know to the deterrent value and efficacy of Tort Law and the example would make a splendid case study for the nation's business schools.

(10) Case of the Recycling Washing Machine That Pulled out a Boy's Arm. In *Carcia v. Halsett*. The plaintiff, an 11-year-old boy, sued the owner of a coin-operated laundromat for injuries inflicted while he was using one of the washing machines in the

launderette. He waited several minutes after the machine had stopped its spin cycle before opening the door to unload his clothing. As he was inserting his hand into the machine a second time to remove a second handful of clothes the machine suddenly recycled and started spinning, entangling his arm in the clothing, causing him serious resulting injuries. The evidence was clear that a common \$2 micro switch—feasible, desirable, long available—would have prevented the accident by automatically shutting off the electricity in the machine when the door was opened. The reviewing court held the laundrette owner strictly liable for defective design because the machine lacked a necessary safety device, an available micro switch. Shortly thereafter the defendant obtained 12 of these micro switches and installed them himself on the machines. Once again, the threat of tort liability serves to deter—the prophylactic purpose of Tort Law at work. The deterrent function of Tort Law is not just an idea in the air; it has landing gear, has come down to earth and gone to work.

#### SUMMARY

The foregoing 10 cases and categories are merely random and representative examples, not intended to be complete or exhaustive, of the deterrent aim and effective of Tort Law in the field of product failure or disappointment.

It needs to be emphasized that the preventive aim of Tort Law is pervasive and runs like a red thread throughout the entire corpus of Torts. For example, the private Tort litigation system has served, continues to serve, as an effective and useful therapeutic and prophylactic tool in achieving better health care for our people by discouraging and thereby reducing the incidence of medical mistakes, mishaps and "misadventures." An error does not become a mistake unless you refuse to correct it. For example, successful medical malpractice suits have induced hospitals and doctors to introduce such safety procedures as sponge counts, electrical grounding of anesthesia machines, the padding of shoulder bars on operating tables, and the avoidance of colorless sterilizing solutions in spinal anesthesia agents. Remember, the fraudulent butchery practiced on defenseless patients by the notorious Dr. John Nork was not unearthed, pilloried or ended by the vigilant action of hospital administrators, peer review groups, or medical societies but by successful, energetically pressed malpractice actions prosecuted by trial lawyers in behalf of the victimized patients.

So we come full circle and end as we began: Accident Prevention Is Better Than Accident Compensation: "A Fence at the Top of the Cliff Is Better Than an Ambulance in the Valley Below." A successful lawsuit and the pressures of stringent liability are one of the most effective means for cutting down on excessive preventable dangers in our risk-leaguered society.

My hero in the foregoing chronicle of good lawyering has been the hard-working trial lawyer with his care, commitment and concern for public safety, the civil religion of us all.

He more than any other professional has proved that we can indeed Sue for Safety. My tribute to him is in words Raymond Chandler used to salute his hero: "Down these mean streets a man must go who is not himself mean, who is neither tarnished nor afraid."

Mr. HOLLINGS. Mr. President, I think the point of the article, Mr. President, is that we really should be focusing on the issue of safety. We have a magnificent record here in the United



States of America with respect to the safety of products, and one of the best articles I have ever seen on this is the one just printed in the RECORD entitled "Suing For Safety" by Thomas F. Lambert. He goes down the various cases up until that particular point some years ago. He says:

Tort law also has a secondary, auxiliary and supportive function—

In addition to compensation for the injured party.

sometimes called the deterrent or admonitory function.

He cites then the various cases that come to mind. "Accident Prevention Through Successful Suits in the Products Liability Field."

Case of the charcoal briquets causing death from carbon monoxide. Liability was imposed on the manufacturer of charcoal briquets for the carbon monoxide death and injury of a young who used the briquets indoors . . .

They produce these in my backyard in South Carolina. The warning is:

Do not use for indoor heating or cooking unless ventilation is provided for exhausting fumes to outside. Toxic fumes may accumulate and cause death.

That is exactly what happened in that case.

So we have hundreds and hundreds, maybe thousands, of individuals that have been saved from death by this one particular case. Specifically, the Moore versus Jewel Tea Co., where "a 48-year-old housewife suffered total blindness from a Drano can \* \* \*" They had an imperfect screw on top of the can and, of course, it came under tremendous pressure and the Drano exploded and caused her blindness.

We also have the case of the Liquid-Plumber, where in almost the same way injuries were reported to defendant. They reformulated its design to produce a safer product. "After some 59 Liquid-Plumber injuries were reported to defendant, it finally reformulated its design to produce a safer product."

Then you have the Tip-over Steam Vaporizer.

A tip-over steam vaporizer scalded a young kid who was walking and tripped and pulled the particular electrical cord, turning it over. The insurance carrier finally balked after hundred claims, and went to the manufacturer and said, "Look, we are not going to continue coverage on your company unless you have recall and redesign." thereafter, the company proudly proclaimed

Cover-lock top protects against sudden spillage if accidentally tipped.

Once again, the tort law had to play professor and policeman and teach another manufacturer that safety does not cost, it pays. All this about consumer cost, I am rather embarrassed to hear some of the arguments. A companion case goes to the Remington Mohawk 600 Rifle case, where when a young lad was trying to put the safety on to the off position, it discharged and shot the boy's father in the back. After pressure was brought Remington sent out this notice:

Important message to owners of Remington Model 600 and 660 rifles, Mohawk 600 rifles and XP-100 pistols. Under certain unusual circumstances, the safety selector and trigger of these firearms could be manipulated in a way that could result in accidental discharge. The installation of a new trigger assembly will remedy this situation. Remington is therefore recalling all Model 600 rifles except those with serial numbers starting with an "A". . . Remington recommends that prior to any further usage of guns included in the recall, they be inspected and modified if necessary. [Directions are then given for obtaining name and address of the nearest Remington recommended gunsmith . . .

Then of course, there was MER/29, the anti-cholesterol drug which turned out to cause cataracts. It would cause a calamity, and blatant fraud was proved on the manufacturer's part when they got into the manufacturer's record. In that particular case, they were manufacturing a dangerous drug. Who did more? Did the Federal Government or private trial lawyers do more in getting this dangerous drug off the market? The question carries its own answer.

The U.S. drug industry has annual sales of \$16 billion per year, while the Food and Drug Administration has an annual budget of \$65 million to oversee drug manufacture safety. How can the foothills keep the Alps under surveillance. Worse, as shown by the Mer/29 experience, enforcement of the law in that situation, far from being vigorous and vigilant, was lame, limp, and lackluster.

So it was the trial lawyers, product liability, all those who are talking about consumers. We are talking about consumers, manufacturers, and everybody else.

The Consumer Product Safety Commission came about at that particular time. That is when we instituted it. The 1982 budget, of course, under President Reagan, cut it some 30 percent. Talking about spending cuts in the Government, in Government spending, in cut spending.

Now, looking at the Dalkon shield, asbestos, DES, slip into reverse transmission, fuel tank scandals—all the way down the list—and we find we have crime in the suites as well as crime in the streets.

We have the case of the infant who died drinking toxic furniture polish, while the manufacturer failed to warn the mother to keep the toxic product away and out of the reach of the children.

We have warning changes as to the foreseeable misuse: "DANGER. HARMFUL OR FATAL IF SWALLOWED. COMBUSTIBLE. KEEP OUT OF REACH OF CHILDREN," and so forth. That was done.

Then we have the case holding the manufacturer of PAM liable for the death of a teenager from inhalation of the PAM concentrated vapors, in the Harless versus Boyle-Midway Division of American Home Products case.

It was uncontested that prior to the lad's death the manufacturer knew of 45 inhala-

tion deaths from the foreseeable misuse of its product, and upon remand admitted to an additional 68 from the same expectable cause.

In examining the label on the can of PAM on the shelf, Mr. President, we have: "WARNING: USE ONLY AS DIRECTED. INTENTIONAL MISUSE BY DELIBERATELY CONCENTRATING AND INHALING THE CONTENTS CAN BE HARMFUL OR FATAL."

We go even to the language difficulties—down in the distinguished Presiding Officer's backyard, they speak Spanish fluently—the case of the poisonous insecticide, holding that warning labels must contain appropriate symbols. Where they cannot read the language, at least they see the symbol. For wrongful death, in the case of Hubbard-Hall Chemical Co. versus Silverman, Puerto Rican laborers that could not understand English had to have, thereupon, the proper symbols.

The First Circuit upheld judgments entered on jury verdicts for the wrongful death of two illiterate migrant farm workers who were imported by a Massachusetts tobacco farmer and killed by contact with a highly toxic insecticide manufactured and distributed by defendant.

We see here, of course, the conspicuous usefulness of the lawsuit as the weapon for ferreting out marketing defects, whether ingenious or ingenious, in selling dangerously defective products.

We have the case, Mr. President, of marketing carbon tetrachloride. That was finally taken, of course, off the market by the FDA as a result of this very disastrous case in Maize versus Atlantic Refining Co. and Tampa Drug Co. versus Wait. The court found that life and limb were too important to trade off against unmarketed inventory.

We have the case, Mr. President, of the 8-year-old boy who choked to death in strangling on a quarter-inch rubber rivet, part of a Riviton toy kit given him for Christmas. The toymaker knew that the Riviton set must be so designed and accompanied by proper instructions and warnings that its parts would be reasonably safe for purposes for which it was intended but also for other uses which, in the hands of the inexperienced, impulsive and artless children, were reasonably foreseeable.

So we had that decision. Parker Brothers decided to halt the sales and recall the toy. The company president, Mr. President, succinctly stated: "Were we supposed to sit back and wait for death No. 3?"

So there is a responsible manufacturer responding to product liability, saving thousands of others that are buying these toys and games. The commendable conduct of Parker Brothers in this case is one of the most striking tributes we know to the deterrent

value and efficacy of tort law. The example would make a splendid case study for the Nation's business schools.

The case then, Mr. President, of the recycling washing machine that pulled out a boy's arm. He had waited for the washing machine at the laundromat for several minutes after the machine had stopped the spin cycle before opening the door to unload the clothing. As he was inserting his hand into the machine a second time to remove a second handful of clothes, the machine suddenly recycled and started spinning and tore his arm off.

The reviewing court held the laundrette owner strictly liable for defective design because the machine lacked the necessary safety device, and of course thereafter they installed what they call a microswitch, which gave safe operation.

I could pursue this on and on, and I should. All we have heard here is a sham pose of how we are, on the floor of the U.S. Senate, sponsoring this bill to save the consumer the cost, the cost of the product, the thrust recognized with the Consumer Product Safety Commission, which has done outstanding work, and that is why this came about.

I could go into flammable pajamas, in the textile field, in my particular backyard. I visited, Mr. President, at Penney's safety laboratory on the 14th floor on Lexington Avenue in downtown New York. I was amazed at what Penney was doing. This was years ago.

I went up on that floor and they had all kinds of safety tests for all the toys and articles going into Penney stores around the country. That is responsible, corporate leadership. That is what product liability has brought about. The manufacturers and the retailers, Penney knows, under joint and several liability, they could be held liable. So they do not just take a product that appears good which they can make a profit on without looking at it themselves.

So we have the large marketing operations like Penney's which have instituted a safety laboratory. This has really saved money, and consumers—I wish they could find for me the word consumer in the Constitution. That is all I hear about with the sham trade policy they have. We are supposed to be saving the manufacturers' backbone, the jobs in the country.

We just referred a little while ago to manufacturing trade. Twenty-five years ago, in 1970, 10 percent of the manufactured products consumed in the United States of America was represented in imports—just 10 percent.

Today, in 1995, 25 years later, over 50 percent of manufactured products consumed in the United States is represented in imports. If we were back to 1970, with 90 percent of manufactured products consumed in the United States produced in the United States, we would automatically have 10 million more manufacturing jobs.

That is middle class. Those running around here wanting to do something

for the middle class: We should build it, we should expand upon it, we should employ them, let them be able to afford a home, afford sending their kids to college.

We are going like the country of Great Britain, where they told them years ago, "Do not worry." Instead of a nation of brawn, we will be a nation of brains; instead of producing products, we will provide services, a service economy. Instead of creating wealth, we are going to handle it and be a financial center.

England has gone to hell in an economic handbasket, with two classes of society, in exactly the way we had it here in the United States of America.

When we get to product liability, we have one of the finest initiatives ever to come about in law. National problem—heavens above. Manufacturers come from the world around and gladly respond to product liability, bragging about their quality and safety, production.

That is what I have in my backyard. I see it. I talk to the Federal judges there. Most of them have been appointed by President Bush, President Reagan, President Nixon, President FORD—all of them.

They are good appointments. I am proud of them. I joined in them in confirming. I know them intimately. They will say, about product liability—they will laugh and they say they know it is a political issue gotten up by Victor Schwartz, the National Association of Manufacturers, the Business Round Table, and the conference board, and they run around and ask candidates for the U.S. Senate, the U.S. House of Representatives, to commit. They use the buzzword reform. "Will you help us on product liability reform?"

I would say 95 percent of those asked as candidates have never tried or were aware of a product liability case. The easy answer, running for reelection or election, be that as it may, is to solve rather than create problems. If you have large financially supportive groups like the Conference Board, the Business Round Table, the Chamber of Commerce, the National Association of Manufacturers asking you, your immediate response is, "Well, sure, yes, I am for reform."

That is why we have been able to hold it up. Because the merit is on our side. This is a solution looking for a problem. There is not a national problem in product liability. Of all civil claims in the United States of America, torts are 9 percent of all civil filings. Of that 9 percent, only 4 percent of the 9,—36/100 of 1 percent—is in product liability. The States, over the past 15 years, with this issue raised, have all reformed—practically all—their product liability laws.

Why change on punitive damages, now the law of 45 States, at the national level? Why change that? Has anybody from the States come up and asked? Not a soul. The nearest they could get—and I remember politically

when they changed it in the Governors Conference. I was waiting for the Governors because I have been a Governor. You could not find a Governor coming up and saying there is a terrible problem in my State. Because you would have to say: Wait a minute, I am a Governor. What did I propose? What did I try to do? So they sent up the executive secretary, who just rattled off some nostrums about litigation. He did not even know what he was talking about.

They brought up other witnesses. It was an embarrassment. In the Alabama cases they talked of businesses suing businesses. It had nothing to do with product liability. The hearings that we had before the Commerce Committee were an embarrassment, the way they were trying to get this thing on. And that is all it is and that is what is holding us up.

On the budget, we have not spent any time on the budget—serious national problems. Welfare reform—serious national problems. Crime, if they want to go back into the crime bill, or terrorism—serious national problems. Telecommunications—serious national problems.

But here they come with 36/100 of 1 percent of tort claims, which habitually have been held, for over 200-and-something years under the English rule, at the State level. They are preaching, if you please, Jeffersonian government, "That government nearest to the people is the best government" and that is why we have to get rid of this Washington bureaucracy, what they call the "corrupt, liberal welfare state." Take housing, block grants back; welfare, block grants back; crime, no policemen on the beat, block grants back—everything back in block grants, save this manufacturers bill. And by the way, as we enunciate the rules and regulations and compliance to the users and so forth, for the lawyers, let us not make them pertain or apply these to the manufacturers themselves.

The unmitigated gall of presenting this in a serious fashion on the floor of the U.S. Senate is an embarrassment to this Senator. I feel very keenly about it. I know I have behind me the American Bar Association. I know I have behind me the Association of State Legislatures. I know I have behind me the States Attorneys General. I know I have behind me the Association of State Supreme Court Justices. I know I have a list of over 130 organizations that we put in there comprising, amongst others, all the leading consumer organizations in the United States. Yet they have the audacity to keep pleading here, we have to save the cost to the consumer, the cost to the consumer.

I yield the floor.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington.

ORDER OF PROCEDURE

Mr. GORTON. Mr. President, I simply would like to inform my colleagues on the status of debate. We have two amendments to the Dole amendment that have been placed before us. One, by the Senator from Maine [Ms. SNOWE] is identical to the amendment that was agreed to this morning as an add-on to medical malpractice. I hope, and ask my colleagues who are here present—I hope we can simply adopt that amendment by a voice vote. We had a rollcall vote this morning on an identical proposition. Then, after an opportunity for Members to come to the floor and to debate the Dorgan amendment, I intend to move to table the Dorgan amendment.

The majority leader has said there will be votes, at least one additional vote and maybe more this evening.

All attempts during the afternoon have been made to secure a unanimous-consent agreement under which we could complete the debate on all amendments relating to punitive damages this evening and in a brief time tomorrow morning and then have a series of votes on punitive damages tomorrow morning, very much like those on medical malpractice today. We have been unable to secure that unanimous-consent agreement. In the absence of being able to secure it, the only way that any progress can be made is by motions to table and record votes on the amendments that are before us or are going to be in front of us.

So I intend at this point to yield so the Senator from Wisconsin may speak, I assume on one of these subjects.

Immediately after he has completed speaking I will ask unanimous-consent that we—I will ask we simply take a voice vote on the amendment by the Senator from Maine, Senator SNOWE. And then after the Senator from North Dakota has an opportunity to speak on his amendment, we will move to table it unless we can secure the unanimous-consent agreement we have been looking for.

I plead with our colleagues to try to do this in an orderly fashion. This is not the end of the bill. We are only attempting by tomorrow to finish up dealing with the subject of punitive damages.

With that, Mr. President, I yield the floor. I think the Member who has been waiting here the longest time to speak is the Senator from Wisconsin.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The majority leader.

Mr. DOLE. Mr. President, I will just take a second. I wonder if the Senator from Wisconsin can give us some idea how long he may wish to speak, and then the Senator from North Dakota, I understand, wishes to speak, too, on his amendment?

I would say before they respond, I share the views just expressed by the

Senator from Washington. We had thought we would have an agreement where amendments would be offered this evening and then tomorrow morning we would start voting on amendments in the order they were offered. Apparently we cannot. Agreement has not been cleared on that side of the aisle.

We are still prepared to negotiate that agreement. That would get us finished with punitive damages on any and all second-degree amendments. Failing that, I do not see any alternative than to stay here late tonight and dispose of as many amendments as we can between now and 11 o'clock or midnight.

If I could just inquire of the Senator from Wisconsin how long he may wish?

Mr. FEINGOLD. I advise the majority leader, about 15 minutes.

Mr. DOLE. How much time does the Senator from North Dakota require?

Mr. DORGAN. Mr. President, I had hoped we would have a lengthier period of debate for my amendment. I offered my amendment prior to a couple of presentations and debate recently on the floor. I had not anticipated my amendment would be voted on tonight.

When I originally discussed this with the Senator from Washington, I understand they were at that point working on a unanimous-consent agreement. I do not know why that unanimous consent agreement has not been agreed to at this point.

But I do know that there are others who wish to speak on my amendment. I would hope that if, however, you dispose of the Snowe amendment, that you would provide further opportunity for some additional debate. It is certainly not my intention to stretch out this process. But, by the same token, I think the Senator would admit that when you offer an amendment, they come to the floor and suggest we have a vote.

Mr. DOLE. Can we vote at 8 o'clock?

Mr. DORGAN. I have some other people who would like to speak on the amendment. But the intention of the Senator from Kansas is to do what?

Mr. DOLE. My original intent was to try to get an agreement where we could offer amendments tonight and vote on those tomorrow which I thought the Senator from North Dakota was supporting and obviously is supporting. For some reason we cannot reach that. The only other alternative we have is to stay here and grind through the amendments because we are now on the second week on this legislation. It seems to me that there may be other things we want to do in the next couple of weeks. But I would be prepared if we can reach an agreement. I certainly am not going to shut off the Senator from North Dakota. But if we could reach some reasonable agreement upon what time we could move to table the amendment, because we are going to stay here late tonight, late tomorrow night, and late the next night if we cannot reach an agreement. We

do not have any alternative. Would the Senator have any indication of how much time he might need?

Mr. DORGAN. I might say to the majority leader, Mr. President, that I would like to visit with some other Members who would like to speak on my amendment. My understanding when I offered the amendment—I discussed it with the Senator from Washington—was that we were going to have a series of votes tomorrow morning. Apparently that has not materialized, at least in an agreement, at this point. But that was my understanding when I offered it.

My intention is that the proposal I have offered would eliminate the punitive damages cap in the underlying legislation. There will be a series of proposals on punitive damages, and there already have been some. And there will be others. This is probably the only opportunity the Senate will have on the issue of eliminating the cap on the underlying bill. I would hate to see a discussion on that issue go by in 15 or 20 minutes. I have spoken briefly. I know others would like to speak on the same subject.

Mr. DOLE. I am trying to reach an agreement. You say 8 o'clock is not enough time. Nine o'clock? Sooner or later we will move to table, if we cannot reach an agreement. We do not have any other recourse. We are the majority. We have to move legislation.

I think the Senator from Washington has a good suggestion. I think we will proceed and let the Senator from Wisconsin proceed, and then I will be recognized at that point either to make a tabling motion or reach an agreement.

Mr. FEINGOLD addressed the Chair.

The PRESIDING OFFICER (Mr. ASHCROFT). The Senator from Wisconsin.

Mr. FEINGOLD. I thank the Chair, and I thank the majority leader.

Mr. President, I believe my remarks at this point are not only relevant to the whole bill but in particular to the contents of the Dole amendment and some of the contents of the further amendments of the Senator from North Dakota.

I would like to take this opportunity to respond to statements made during the debate last week by the senior Senator from Washington that suggests that somehow or another the arguments that this bill has seventh amendment implications is somehow a bizarre argument.

In effect, that statement was made by the distinguished Senator from Washington on the opening day of this debate, on April 24, following the opening remarks by the Senator from South Carolina. On April 26, after my own remarks referencing the seventh amendment to the U.S. Constitution, the Senator from Washington described references to the seventh amendment in this context as both curious and bizarre.

I note that the Senator from Washington was very careful not to assert

that either the Senator from South Carolina or the Senator from Wisconsin were making the argument that the pending legislation literally violated the seventh amendment, but rather he stated that we were "somehow or another implicating the seventh amendment right of trial by jury into this debate and thereby implied at least that the bill before us somehow or another restricts that constitutional right to trial by jury." That is the end of his statement.

Mr. President, I find the statements made by the Senator from Washington to be somewhat curious for two reasons:

First, a number of State courts have already struck down State statutes imposing limitations on amount of damages that juries can award as violating State constitutional guarantees of a right to trial by jury.

There is nothing strange or bizarre about suggesting that such limitations on the ability to recover may violate fundamental right to trial by jury since a number of State courts have already made precisely that determination with respect to similar State laws, and similar State constitutional provision.

For example, in *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla 1987) a \$450,000 cap on noneconomic damages in tort actions was found to violate a right of access to the courts and the right to a trial by jury.

In *Kansas Malpractice Victims Coalition v. Bell*, 757 P 2d 251 (Kan 1988), a limit on noneconomic damages and on total damages was held to violate the state guarantee of right to remedy and jury trial.

In *Sophie v. Fibreboard Corporation*, 771 P. 2d 711 (Wash, 1989) a cap on noneconomic damages in tort actions was found to violate the State constitutional right to a jury trial. The Court said in the Sophie case that "[the state of Washington] has consistently looked to the jury to determine damages as a factual issue, especially in the area of noneconomic damages. The jury function receives constitutional protection [under the State constitution] which commands that the right of trial by jury shall remain inviolate".

There has thus been a series of State cases holding that statutory limitations quite similar to those proposed in the pending legislation violate State constitutional provisions guaranteeing a right to a trial by jury.

As the Senator from Washington well knows, the seventh amendment has not been held to apply to State court proceedings. Indeed, both the Senator from South Carolina and I have been careful not to argue that the legislation violates the seventh amendment as applied to State court proceedings.

However, many State constitutions provide for constitutional guarantees for trial by jury in State court proceedings that parallel the seventh amendment, and, as I have cited, a number of courts have held that limi-

tations in State laws similar to those proposed in this legislation which limit the ability of a jury to award damages violate the right to a trial by jury under those State constitutional provisions.

So, Mr. President, that is the first reason it is neither bizarre nor inappropriate to argue about the right to trial by jury and the impact this legislation may have on it. But there is a second reason, Mr. President.

Second, it is clear that this legislation is an assault upon the American jury system and that is precisely what the proponents intend—an assault upon the American jury system.

Repeatedly, supporters of this legislation have asserted that it is needed because of excessive jury awards in product liability and other tort litigation.

They have repeatedly argued that the legislation is necessary to curb American juries from making these excessive awards.

This debate has been full of so-called examples of excessive jury awards, starting with the infamous McDonald coffee case.

In fact, this is a specious argument.

To the extent that jury verdicts have been excessive, courts have routinely stepped in and reduced the awards, using their long-established powers of remittitur.

The infamous McDonald coffee case is an excellent example. The court there reduced the jury award from \$2.7 million to \$480,000.

I ask unanimous consent that a "Dear Colleague" I recently circulated dealing with the myth of excessive jury awards be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. FEINGOLD. Mr. President, this legislation would not only curtail the power of juries to determine the amount of punitive damages to be awarded; it would also prevent certain evidence relating to damages from even being presented to the jury in the first place. That has something to do with the right to trial by jury.

Section 107 provides that evidence relating to the punitive damages, for example, evidence of willful misconduct, would be inadmissible during the compensatory damages stage of the proceeding.

That section 107 also provides that evidence relating to a defendant's wealth, which I think is clearly a relevant factor in assessing what level of punitive damages should be assessed, could not be presented to the jury, which, in my view, is another serious derogation from the right to trial by jury.

Other proposals which may soon be added to this measure would do even more of the same.

They would prevent juries from making punitive damages awards entirely, leaving those decisions not to the jury but to judges alone.

All of these proposals, in my view, evidence a clear and very disturbing distrust of the jury system itself. And it looks to me like a presumption somehow that juries are incapable of reaching good decisions without these kinds of federally mandated restraints and constraints on the jury. That is what this is—a new Federal mandate that constrains and restrains juries.

Mr. President, as we debate whether Congress should place these kinds of mandates or restrictions on the deliberation of juries, it may help actually to take just a few moments to reflect upon the historical importance placed upon the jury system in our Nation.

The right to a trial by jury in civil as well as criminal cases was one of the most important rights that was sought by the framers of our Constitution.

Indeed, one of the primary grievances of the American colonists against the British was the extensive effort by the British to shift the adjudication of civil and criminal disputes from the colonial courts, where the local juries traditionally sat, to the vice-admiralty courts and other nonjury tribunals administered by judges who were, of course, completely beholden to the British Crown.

So this is not something that we just came up with recently. This goes back as far as our country's history to the colonial era.

This anger over the fact that under the British rule juries were being deprived of their authority was actually expressed in the Declaration of Independence itself, which cites among the many grievances lodged at the British, "For depriving us in many cases, of the benefits of Trial by Jury."

Thomas Jefferson described the jury in his writings as "the only anchor yet imagined by man, by which a government can be held to the principle of its Constitution."

Mr. President, in the constitutional convention, the proposed Constitution included the right to trial by jury in criminal cases under article III, but the absence of an expressed guarantee of the right in civil actions was condemned by the antifederalists as sufficient cause to reject the entire Constitution.

So the entire Constitution was in some jeopardy because of that omission. And, of course, it was those kinds of concerns of those who were not entirely happy with the Constitution itself that led to our Bill of Rights, specifically their demand for an explicit guarantee for the right of a trial by jury for civil cases, that led to its inclusion in the seventh amendment to the U.S. Constitution in our Bill of Rights.

Mr. President, it was included from the first among Madison's proposals for the Bill of Rights, noting "in suits at common law, the trial by jury, as one of the best securities to the right of the people, ought to remain inviolate."

Juries were regarded by the Framers, according to one constitutional scholar, Morris Arnold, in a 1980 University of Pennsylvania Law Review article, "A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation," "as more than a 'mode of trial' they were instruments of local government as well."

I find that very interesting. The 104th Congress, I think, should be given the most credit on any issue perhaps so far for having dealt with that whole overriding issue of unfunded mandates, of showing respect for the local levels of government.

Mr. President, our Framers perceived the jury as one of those local levels of government, one of those institutions that was made up of the people back home not specifically beholden either to this Federal Government or, before the revolution, the British Crown.

Indeed, this view of juries as a critical element of the American democracy prompted Alexis de Tocqueville to observe in "Democracy in America," "The jury is, above all, a political institution, and it must be regarded in that light in order to be duly appreciated."

More recently in our modern history, Chief Justice Rehnquist recognized the historical role of the American jury in his dissenting opinion in *Parlane Hosiery Co. versus Shore* in 1979, in which our current Chief Justice stated, "The founders of our nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign."

Mr. President, that is what this bill is all about today. This is the sovereign, the Federal Government, choosing to override the right of State and local juries to make the decisions about what a jury should be free to do. This is exactly what Chief Justice Rehnquist must have meant.

The Supreme Court has repeatedly recognized the fundamental importance of trial by jury, stating in *Dimmick versus Schiedt*, that "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment to the right to a jury trial should be scrutinized with the utmost care."

Tort reform, particularly limits on the amount of damages that juries may award, clearly implicates this right to trial by jury, as a number of State court decisions have held with respect to State laws and constitutional guarantees to trial by jury.

As the Washington Supreme Court found in the *Sophie* case, statutory damage limits interfere with the jury's traditional function to determine damages.

That case also contains a very instructive discussion of the difference between a trial judge's power of remittitur to reduce a jury verdict and

a statutory cap, an overall, across-the-board cap, on the amount of damages a jury can award.

The court observed that the judicial finding that an award is too high in a particular case is fundamentally different from a legislatively imposed "remittitur" that operates automatically in all cases without regard to the facts and justice of the case.

A judge implements remittitur only under well-developed constitutional guidelines that provide that a judge can only reduce a jury's damages determination when that determination was wholly unsupported by the evidence, obviously motivated by passion or prejudice, or when in certain cases it actually shocks the conscience just for a jury to have given such an excessive award.

Mr. President, absent such factors, there is a strong presumption in favor of the jury's determination. And that comes to us all the way back from the Framers and the seventh amendment.

Finally, the opposing party in cases of remittitur has the choice generally of accepting the reduction or seeking a new trial. It is not necessarily completely the end of the line.

None of these safeguards, as was observed by the court in the *Sophie* case, is present in one of these across-the-board statutory damage limits that is contemplated by the legislation before us.

The system of remittitur thus operates in a fashion very different from the kind of statutory caps that are being advocated by the people who are presenting the so-called tort reform.

Mr. President, I do not intend to get into an extensive debate about whether or not the pending legislation violates the seventh amendment in practical terms, since the seventh amendment has not, to this date, actually been applied to the States through the 14th amendment, although it is certainly applicable, of course, to proceedings in Federal court.

It certainly, however, Mr. President, violates the spirit of the seventh amendment, which was intended to assure that local juries, local folks on local juries comprised of one's peers, not just governmental officials in Washington, would be the ones to make these decisions.

I am advised that this measure, should it be enacted, Mr. President, will be challenged in court before the ink is dry, both on the basis of the seventh amendment and on the basis of last week's decision in *United States versus Lopez*, which restricts the right of Congress to intrude upon areas which have been traditionally regulated by the States under their own powers.

The decision in *Lopez* states that the scope of constitutional authority under the interstate commerce power "must be considered in light of our dual system of government and not be extended so as to embrace effects upon interstate commerce so indirect and remote

that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

Now that sounds like language, Mr. President, of the so-called Contract With America—let us not take away the power of the States and the local governments. But, in a very real sense, that is the best description of this bill I have heard.

Mr. President, I am one of the few Members of Congress who voted against the 1994 crime bill; in fact, one of only two Democrats to vote against the crime bill. I did it, in part, because I believe it represented an inappropriate incursion of the Federal Government into areas of law enforcement which had throughout our history been within the province of State and local law enforcement agencies.

My reasons at the time were based upon policy concerns that the Federal Government ought to do a better job with the responsibilities that clearly rested at the Federal level than seeking to usurp State and local law enforcement responsibilities.

Last week's decision, of course, by the U.S. Supreme Court adds an even more compelling argument to the debate.

Congress does need to learn to restrain itself from trying to take on every problem that gets a headline in the newspaper. We need to learn to say that some problems are better addressed at the State and local level.

That is why I voted for the unfunded mandates bill, and I believe, Mr. President, if especially the new Senators take a look at this bill, tort reform is clearly one of those areas that belongs with the States. I do not think the Federal Government knows better than the 50 States of this country as to what should be a law in this area.

There is often a great deal of rhetoric about what the Founding Fathers might think about various contemporary problems and how our Government deals with those problems. All we can do is speculate. It was 200 years ago. But every argument makes us want to know, even though we cannot know for sure, what the Framers would have said.

At least one of the proponents of this legislation argued last week that if we asked the Framers, they would not have wanted juries to consider medical malpractice or product liability cases. I do not agree with that at all. I think that would have made a lot of sense to them.

I, for one, believe that the Framers would be horrified—horrified—at the idea of the Federal Government passing legislation like this to preempt the powers of State governments, to require State courts to follow Federal law in an area which has been the domain of the States and local governments and local juries for 200 years.

They would have been horrified to hear the arguments that somehow the

common citizens, the average folk of this country who comprise American juries, are somehow out of control and that they need the Federal Government in Washington to check their powers. That is about as direct an offense to the folks back home as I can think of, saying they cannot handle it on these juries, that they are out of control.

I think the American patriots who fought against the British attempts to take power away from colonial courts, to prevent local juries from rendering decisions would turn over in their graves to hear such arguments advanced in their name and in defense of this legislation.

Mr. President, this legislation is nothing more or less than an assault on the American jury system. It is predicated on a belief that local juries are not capable of rendering fair decisions. It is an attempt—a serious attempt—to diminish the role of juries, a role which our Framers regarded as vital to our democracy and system of government, and I think it should be soundly rejected.

I just want to raise one last point that actually came out during the Commerce Committee hearing, and I think it is worth repeating.

Testifying on behalf of the Conference of Chief Justices and in opposition to this bill was the Honorable Stanley Feldman, the chief justice of the Arizona State supreme court. The chief justice pointed out that in many States, we have entrusted juries with virtually all major decisions, including the decision of whether or not to sentence a criminal defendant to death.

In criminal courts, we say to the juries, here are the facts of the case, here is what the prosecution claims the defendant did, here is the defendant's alibi or confession and here is the doctor's psychiatric evaluation. We give the juries all of this information, and then we ask them to make a final judgment about whether a person should live or die.

As Chief Justice Feldman illustrated, it is almost bizarre that those who believe we should entrust with juries the power to put people to death also maintain that juries are unable to objectively calculate what a reasonable punitive damage award should be.

I find it unfathomable that we can say that juries are qualified to impose the death penalty on criminal defendants but underqualified and incapable to assess monetary penalties against civil defendants. I am afraid that says something about what our society has come to value in this day and age.

Mr. President, to conclude, this may not literally be an issue of whether the seventh amendment literally applies in this situation. It may, as constitutional interpretation has done with respect to Federal aspects of this bill. But, obviously, the right to trial by jury has to have some core meaning and, at some point, if you limit what a jury can do to make a person whole or

you restrict the evidence a jury can hear to make its decision, it has to have an impact on the right to trial by jury.

Maybe we have not reached that point yet in our legislation in this country, but I believe this bill takes us quite far over the line and does seriously diminish what I think most Americans would agree is properly the role of the jury, not the role of the U.S. Congress.

I thank the Chair, and I yield the floor.

#### EXHIBIT 1

DEAR COLLEAGUE: As the debate continues around the product liability bill, I wanted to address one of the many myths circulating about the need for this legislation: that juries are out of control and they are subject to no restraints under current law. Quite simply, I believe this attack upon the jury system is unwarranted.

For over two hundred years Americans have valued the jury box as much as they have valued the ballot box. Perhaps there is nothing more symbolic of or distinguishing about the American judicial system—the greatest judicial system in the world—than the principal of trial by jury.

The one distinguishing characteristic about American jurors is that they have no distinguishing characteristics. A juror could be the waitress that served you breakfast this morning. It could be the person who delivers your mail. It could be your doctor, a family member or even your favorite celebrity. And we must remember that jurors today are just as capable of administering fair and equal justice as were jurors in 1791, the year the Seventh Amendment and the Bill of Rights were ratified.

Unfortunately, the powerful supporters of S. 565 have run an effective campaign of misinformation about jury verdicts in recent months. They have tried to convince this country that jurors are determined to drive American manufacturers and corporations into bankruptcy. Of course, nothing could be further from the truth.

A well-known study by Professors Michael Rustad and Thomas Koenig—referred to by the Supreme Court as the “the most exhaustive study” ever on punitive damages—found only 355 punitive damages awards in federal and state courts for product liability cases between the years 1965–1990. Not counting the cases that related to asbestos, that is an average of about 10 punitive damage awards a year—hardly a situation of vindictive juries running amok in America.

Does this mean that juries are inhuman and incapable of mistakes? Does it mean that jury decisions should be absolute with no checks or limits? Of course not. In fact, just last year the Supreme Court affirmed in *Honda Motor Company v. Oberg* that judges have a clear authority and obligation to limit punitive damages awarded by juries. As Justice Stevens wrote in his majority opinion, “. . . judicial review of the size of punitive damage awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded.”

In their study, Professors Rustad and Koenig found that of the 355 punitive damage awards in the past 25 years, 90 of these awards—about 25 percent—were either reversed or remitted by the presiding judge. Take the infamous McDonald's coffee case. The jury awarded \$2.7 million in that case—the equivalent of two days' worth of McDonald's coffee sales. The judge reduced this to \$480,000 or three times the plaintiff's economic damages. Judges can and do reduce these awards.

In short, this is reflective of a system of justice in which juries prescribe appropriate sanctions against parties that have been found guilty in a product liability action and at the same time bestows upon judges a necessary oversight role that is exercised with frequency and prudence.

The fundamental issue here is this: If an injured consumer sues a manufacturer in a state court, who do you trust to administer justice in that case—the judge and the jury, or Congress?

Best regards,

RUSSELL D. FEINGOLD.

Mrs. HUTCHISON addressed the Chair.

THE PRESIDING OFFICER. The Senator from Texas.

Mrs. HUTCHISON. Mr. President, the time has come for us to put some common sense in our court system. There is no question that we must make sure that every person has a right to go to court if that person has been injured. But we see courts being overcrowded, we see defendants having to settle because it is less expensive to settle than to go ahead and try a case. We have seen research, particularly in the area of women's health, being shut off because the drug companies and the pharmaceuticals just cannot do it. They cannot do it because of the liabilities they are afraid they will incur.

This is the eighth consecutive Congress in which the Senate or the Commerce Committee has considered product liability. During that time, the need for product liability reform has grown by leaps and bounds. A study by the Texas Public Policy Foundation found that from the early 1980's to the early 1990's, the total number of punitive damage awards in Dallas County was 14 times greater and the average award, adjusted for inflation, was 19 times higher.

In Harris County, which is Houston, total awards were up 26-fold and the average award was up eightfold, and that is from a House Judiciary Committee report.

My State of Texas and the State of California have begun to take steps to control this growth. But this is all over the country. These things are happening all over our country, and it is affecting the price of our products and the ability to do research.

In a recent letter, Robert Bork, the judge, explained how product liability laws force national manufacturers to plan and protect themselves against lawsuits in the most litigious States. He said a State like California or Texas can impose its views of appropriate product design and the penalties for falling short on manufacturers and distributors across the Nation. He found this to be a perversion of federalism. Instead of national standards being set by the National Legislature, national standards are set by the courts and juries of particular States. He was making the case that it is Congress' role at the Federal level to take control of this situation. It is a matter of interstate commerce. It is something that we must deal with.



Today, we are talking about an amendment by the majority leader—and I am a cosponsor of this amendment—to provide the same protection from excessive punitive damage awards that this bill provides for manufacturers and retailers, to civic groups, to charities, to churches, and to local governments. Our courts are being misused. People who have not done anything wrong are being held up for settlements, and now this applies to Girl Scouts and Boy Scouts, to our Boys and Girls Clubs of America.

Congress must take control. We can lower prices, we can lower insurance premiums, we can have new business starts, we can get new products and drugs on the market, we can increase jobs, and we can free the people who want to volunteer to do that without fear of retribution by a lawsuit.

We can keep cities and towns from being bankrupted by lawsuits over playground accidents. We can keep volunteers helping the needy by maintaining a proportionality between compensatory and punitive damage awards in tort actions. We must expand the product liability bill to protect all Americans from unnecessary and frivolous lawsuits, from excessive damages for injuries they did not cause.

This bill, under the leadership of Senators GORTON and ROCKEFELLER, goes a long way in the right direction to try to bring these abuses to heel. It is time to end the judicial lottery and put common sense back in the courts. If we are going to do that, Mr. President, I think we must apply it to the cities because, after all, it is the taxpayer who always foots the bill when there is a lawsuit that gets an award that the city's insurance does not cover. Who pays? You know. We all know. It is the taxpayers of this country. When it is the Girl Scouts selling cookies and they have a frivolous lawsuit because it is just assumed they would have deep pockets, who pays? It is all the good deeds and the leadership qualities that Girl Scouts give that will suffer.

It goes on and on, Mr. President. We must take control of the situation. I hope the Senate will not let this bill go by the wayside. I hope we do not argue and bicker so that we are not able to get a good bill out of this body, so that we can go to conference and work with the House and send something to the President that I hope he will sign. If we can do that, we will be able to reopen research that has been left out of the game right now because people are just not able to afford to do it, because they cannot protect themselves from the litigation attempts.

So I am hoping that we will take action so that we can open up the research capabilities and open up our playgrounds and swimming pools. Personal responsibility is a new theme in America that has been rejuvenated from the past. I think personal responsibility is part of what we are about. We are not talking about legitimate issues of a person being injured. We are

not talking about the right to have economic damages, some damages for pain and suffering—absolutely not. I have heard stories on the floor for the last week that are heart wrenching.

There is no question that some people are entitled to damages. But we have to curb the excesses. We have to bring common sense back into the mix. That is what this bill will do. I urge my colleagues to support the Dole amendment so that everyone will have the same coverage as the corporations do. I urge my colleagues to look at the big picture and try to make the decision to get a good bill out of the Senate so that we can send something to the President that I hope he will, in the name of responsibility, be able to sign.

I yield the floor.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. SHELBY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SHELBY. Mr. President, the legislation that we are considering today has no place on the Senate floor or on the Senate calendar. This legislation is a blatant attempt to eliminate over 750 years of Anglo-American common law and to federalize over 200 years of State Tort law in this country.

I want to return power to the States, not federalize important areas of State control. I thought that returning power to the States was a major part of the philosophical victory of the Republican party, my party, which occurred last fall.

Mr. President, our current legal system, based on Anglo-American law, has its beginning in A.D. 1215 when the barons of England forced King John to sign the Magna Carta at Runnymede. The Magna Carta placed the King under the law and put limits on royal power. It also created remedies for many of the abuses that were occurring in England and gave legal protection to the English ruling class, which was later expanded to all Englishmen. Following the Magna Carta other English legal documents provided for additional legal protections for British citizens and the concept of rule of law.

Ultimately, the Magna Carta has come to stand for the proposition that no man is above the law.

English courts, after the Magna Carta, went on to develop a system of common law to provide legal protection to all men and women, the likes of which the world had never seen. Common law, including all Tort law, is basically judge-made law. For hundreds of years English judges decided cases which in turn formed the basis for future decisions.

Under the Magna Carta, the later laws passed by the British Parliament, and the English common law, men were

for the first time given certain basic rights in the legal system such as due process, jury trials, and the right to cross examine witnesses.

Mr. President, this system of Anglo-American law was brought to our shores by English settlers and was adopted by our Founding Fathers when they wrote the United States Constitution—the single most important document in our land. Many of the provisions of the Magna Carta anticipate rights that were embedded in the U.S. Constitution and American law.

Our Constitution created a Federal system of Government. Under this system, that so many in this body appear to want to do away with, the Federal Government has certain areas of responsibilities and the States have their areas of influence.

As early as 1648 in the Maryland Act for the Liberties of the People, American colonists explicitly recognized that they were protected and governed by the common law. In 1774, the Declaration of Rights of the First Continental Congress stated that the "Colonies are entitled to the common law of England." After the American Revolution, the colonies, and later the 13 States developed and adopted the common law to their own needs and circumstances. Common law, including Tort law, has remained solely a responsibility of the States for over 200 years.

Mr. President, I would like to direct my colleagues' attention to the tenth amendment of the U.S. Constitution, the tenth amendment states that:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

For over 200 years, the States have had the responsibility and a duty, Mr. President, to develop tort law. They have done so.

The bill we are considering today is the first step, I believe, in destroying the States' important role in developing and administering rules and laws for the redress and compensation for various torts, including product liability cases.

In addition to eliminating over 750 years of Anglo-American common law, this bill violates the 10th amendment of our Constitution and the basic principles of American federalism.

Mr. President, the States have truly served as laboratories of democracy over the last 20 years in the area of tort reform. Virtually every State in the country has significantly reformed its legal system as it relates to product liability.

Where there have been problems, the States have examined their legal systems and corrected the problems. As Supreme Court Justice Powell has stated,

Our 50 States have developed a complicated and effective system of tort laws and where there have been problems, the States have acted to fix those problems.

There is no current justification, I believe, Mr. President, for federalizing

our Nation's tort system. Under the logic of this bill, if we carry it a step farther, if we federalize all product liability cases, why do we not federalize all civil and criminal statutes?

The Federal Government can usurp all State power. We know that. Unfortunately, Mr. President, there are many in this body who see federalizing product liability law and other things as a first step to federalizing all legal matters.

This bill will substantially disrupt and may end our country's State common law system. It will result in additional litigation in both State and Federal courts.

Mr. President, I hope that my colleagues will think long and hard before they go down the path toward ending federalism as we know it and preempting all State common law.

The Federal Government, including the Congress, I believe, cannot solve all of our society's ills by Federal statute.

I find this legislation totally unacceptable, and I urge all my colleagues to vote and work against it.

AMENDMENT NO. 621 TO AMENDMENT NO. 617

(Purpose: To provide that a defendant may be liable for certain damages if the alleged harm to a claimant is death and certain damages are provided for under State law, and for other purposes)

Mr. SHELBY. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The pending question is the Gorton amendment No. 620.

Mr. SHELBY. Mr. President, I ask unanimous consent that this amendment be made a second-degree amendment to the Dole amendment.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Alabama [Mr. SHELBY], for himself and Mr. HEFLIN, proposes an amendment numbered 621.

Mr. SHELBY. Mr. President, I ask unanimous consent that the reading be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the appropriate place insert the following:

**SEC. . LIABILITY FOR CERTAIN CLAIMS RELATING TO DEATH.**

In any civil action in which the alleged harm to the claimant is death and the applicable State law provides, or has been construed to provide, for damages only punitive in nature, a defendant may be liable for any such damages regardless of whether a claim is asserted under this section. The recovery of any such damages shall not bar a claim under this section.

Mr. SHELBY. Mr. President, I have made statements in the past about the negative effects this bill will have on State laws and federalism in general. Tonight, I want to be more specific.

My State of Alabama has a wrongful death statute whose damages are construed as only punitive in nature—yes, only punitive in nature.

Under the product liability bill that we are considering today in the Senate, along with some of the proposed amendments to this bill, people who have committed or are guilty of a wrongful death in my State of Alabama, the damages available will be severely limited.

In 1852, quite a while ago, the Alabama legislature passed what is known as the Alabama Homicide Act. This act permits a personal representative to recover damages for a death caused by a wrongful act, omission, or negligence. For the past 140 years, the Alabama Supreme Court has interpreted this statute as imposing punitive damages for any conduct which causes death.

Alabama believes that all people have equal worth in our society, so the financial position of a person is not used as the measure of damages in wrongful death cases in my State. The entire focus of Alabama's wrongful death civil action is on the cause of the death.

The amendment that I am offering tonight on behalf of myself and my colleague, Senator HEFLIN, will provide that in any civil action where the alleged harm to the claimants is death and the applicable State law only allows for punitive damages such as Alabama, the punitive damages provision of this bill will not apply—in other words, of the Federal statute if it were to pass.

Mr. President, I believe there are legitimate reasons to exclude from coverage of this bill actions such as those brought under Alabama's wrongful death statute.

I urge all of my colleagues to support this important amendment to my State.

Mr. HEFLIN. Mr. President, I rise in support of the Shelby amendment.

In all of the 50 States, Alabama has a different and unique recovery in the event that a decision is made by a court or jury in regard to the death of an individual, whether it be brought by negligence or any form of action. Alabama's wrongful death statute is unlike any other State's wrongful death statute because its damages are punitive only. A person cannot prove, in a wrongful death case in Alabama, compensatory damages. An Alabama plaintiff cannot show his wages, his doctor bills, or anything similar of an economic or noneconomic nature. Alabama's statute is very unique and different from any other State.

The language of the Shelby amendment was included in a number of previous bills that were reported out of the Commerce Committee. In the 102d Congress, in the bill that was reported out, S. 640, and in several bills that were reported out of the Commerce Committee on product liability previous to that, they contained the exact language of the pending Shelby amendment. This had been worked on, and there had been several drafts and everybody agreed that it was a proper amendment to be included.

I suppose since I have opposed the overall product liability, this provision may have been taken out. What I am saying is that the citizens of Alabama ought not to be at a disadvantage in regard to recovery under whatever product liability bill is passed.

The language of this amendment was agreed to and was in previous bills but has been omitted from this bill. Basically, it allows for punitive damages as the element of damages that is allowable. A person is not allowed to have compensatory damages. A wrongful death statute does not allow even for the matters pertaining to loss of wages or pain and suffering or anything else. It is strictly a matter left to the jury on the wrongful death issue, and has been in existence for a long time. The defense bar, the plaintiff bar, have all agreed that this is a type of damage that ought to prevail, pertaining to wrongful death in Alabama.

This concept was developed many years ago in what we know as the Lord Campbell Act. The Lord Campbell Act was passed because English jurisprudence realized that a defect existed in common law in that there were questions as to whether or not when someone died, that the cause of action survived.

Many States passed wrongful death statutes, and following the Lord Campbell Act that was passed in England, the Alabama Supreme Court a number of years ago, well over 100 years ago, interpreted that act as being punitive in nature only and compensatory damages could not be proved.

As a result, under the current language of punitive damage provisions in the product liability bill, unless the Shelby amendment is adopted, then a person who is killed in my State in a wrongful manner could not recover any damages.

I support the Shelby amendment. I think it ought to be adopted. I think if we look back into the past history and those that have dealt with it, we see that everybody at a previous time who worked on this came up with an agreement language, and it is one, I think, that ought to be adopted by the Senate.

I want Members to check with various people involved in this, and I think it is a legitimate amendment. It ought to be passed, or otherwise the people in the State of Alabama will be the only State in the Nation that could not recover when an individual is killed by negligence or by gross negligence or recklessness or wantonness or any type of proof that is necessary to prove a cause of action.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call.

Mr. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 617, AS MODIFIED

Mr. DOLE. Mr. President, I send a modification to my amendment to the desk.

The PRESIDING OFFICER. The Senator has that right. The amendment is so modified.

The amendment (No. 617), as modified, is as follows:

On page 19, strike line 12 through line 5 on page 21, and insert the following:

**SEC. 107. PUNITIVE DAMAGES IN CIVIL ACTIONS.**

(a) FINDINGS.—The Congress finds that—

(1) punitive damages are imposed pursuant to vague, subjective, and often retrospective standards of liability, and these standards vary from State to State;

(2) the magnitude and unpredictability of punitive damage awards in civil actions have increased dramatically over the last 40 years, unreasonably inflating the cost of settling litigation, and discouraging socially useful and productive activity;

(3) excessive, arbitrary, and unpredictable punitive damage awards impair and burden commerce, imposing unreasonable and unjustified costs on consumers, taxpayers, governmental entities, large and small businesses, volunteer organizations, and nonprofit entities;

(4) products and services originating in a State with reasonable punitive damage provisions are still subject to excessive punitive damage awards because claimants have an economic incentive to bring suit in States in which punitive damage awards are arbitrary and inadequately controlled;

(5) because of the national scope of the problems created by excessive, arbitrary, and unpredictable punitive damage awards, it is not possible for the several States to enact laws that fully and effectively respond to the national economic and constitutional problems created by punitive damages; and

(6) the Supreme Court of the United States has recognized that punitive damages can produce grossly excessive, wholly unreasonable, and often arbitrary punishment, and therefore raise serious constitutional due process concerns.

(b) GENERAL RULE.—Notwithstanding any other provision of this Act, in any civil action whose subject matter affects commerce brought in any Federal or State court on any theory, punitive damages may, to the extent permitted by applicable State law, be awarded against a defendant only if the claimant establishes by clear and convincing evidence that the harm that is the subject of the action was the result of conduct by the defendant that was either—

(1) specifically intended to cause harm; or

(2) carried out with conscious, flagrant disregard to the rights or safety of others.

(c) PROPORTIONAL AWARDS.—The amount of punitive damages that may be awarded to a claimant in any civil action subject to this section shall not exceed 2 times the sum of—

(1) the amount awarded to the claimant for economic loss; and

(2) the amount awarded to the claimant for noneconomic loss.

This subsection shall be applied by the court and the application of this subsection shall not be disclosed to the jury.

(d) BIFURCATION.—At the request of any party, the trier of fact shall consider in a separate proceeding whether punitive damages are to be awarded and the amount of such an award. If a separate proceeding is requested—

(1) evidence relevant only to the claim of punitive damages, as determined by applicable State law, shall be inadmissible in any proceeding to determine whether compensatory damages are to be awarded; and

(2) evidence admissible in the punitive damages proceeding may include evidence of the defendant's profits, if any, from its alleged wrongdoing.

(e) APPLICABILITY.—Nothing in this section shall be construed to—

(1) waive or affect any defense of sovereign immunity asserted by the United States, or by any State, under any law;

(2) create any cause of action or any right to punitive damages;

(3) supersede or alter any Federal law;

(4) preempt, supersede, or alter any State law to the extent that such law would further limit the availability or amount of punitive damages;

(5) affect the applicability of any provision of chapter 97 of title 28, United States Code;

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

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

(f) FEDERAL CAUSE OF ACTION PRECLUDED.—Nothing in this section shall confer jurisdiction on the Federal district courts of the United States under section 1331 or 1337 of title 28, United States Code, over any civil action covered under this section.

(g) DEFINITIONS.—For purposes of this section:

(1) The term "claimant" means any person who brings a civil action and any person on whose behalf such an action is brought. If such action is brought through or on behalf of an estate, the term includes the decedent. If such action is brought through or on behalf of a minor or incompetent, the term includes the legal guardian of the minor or incompetent.

(2) The term "clear and convincing evidence" means that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. The level of proof required to satisfy such standard shall be more than that required under preponderance of the evidence, and less than that required for proof beyond a reasonable doubt.

(3) The term "commerce" means commerce between or among the several States, or with foreign nations.

(4)(A) The term "economic loss" means any objectively verifiable monetary losses resulting from the harm suffered, including past and future medical expenses, loss of past and future earnings, burial costs, costs of repair or replacement, costs of replacement services in the home, including child care, transportation, food preparation, and household care, costs of making reasonable accommodations to a personal residence, loss of employment, and loss of business or employment opportunities, to the extent recovery for such losses is allowed under applicable State law.

(B) The term "economic loss" shall not include noneconomic loss.

(5) The term "harm" means any legally cognizable wrong or injury for which damages may be imposed.

(6)(A) The term "noneconomic loss" means subjective, nonmonetary loss resulting from harm, including pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation.

(B) The term "noneconomic loss" shall not include economic loss or punitive damages.

(7) The term "punitive damages" means damages awarded against any person or entity to punish such person or entity or to deter such person or entity, or others, from engaging in similar behavior in the future.

(8) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States, or any political subdivision of any of the foregoing.

UNANIMOUS CONSENT  
AGREEMENT

Mr. DOLE. Mr. President, I think we have a consent agreement now. I will recite it. If there are any questions I will be happy to respond.

I ask unanimous consent that during the Senate's consideration of H.R. 956, all second-degree amendments to the Dole amendment must be debated during today's session of the Senate.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DOLE. I further ask that any votes ordered on or in relation to second-degree amendments to the Dole amendment, No. 617, occur beginning at 11:15, and that the final vote in the sequence be on or in relation to the Dole amendment, No. 617, as amended, if amended.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HEFLIN. Just a moment. I reserve the right to object.

I mean if the final—oh, I see; in the sequence in relationship. So it does not mean that that is the final vote of the day or anything like that?

Mr. DOLE. No. I wish it were.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DOLE. I further ask that at the hour of 10:15 a.m. there be 1 hour for debate to be equally divided between the two managers for discussion on any of the pending amendments to the Dole amendment.

Mr. HEFLIN. I assume that, in regards to that, it is to the managers, between the managers. That means that people who are opponents to the various amendments rather than the managers would be—

Mr. DOLE. I think that provision is set to accommodate the Senator from Alabama. If the Senator from West Virginia has no objection, I can say to the Members in opposition—

Mr. ROCKEFELLER. The Senator from West Virginia will do it in any way that is equitable.

Mr. HEFLIN. Why not put it that half of the time be under control of Senator HOLLINGS or his designee?

Mr. DOLE. Would that be all right with the Senator from West Virginia?

Mr. ROCKEFELLER. That will be fine.

Mr. DOLE. So I modify the request, time to be equally divided between