The motion to lay on the table was agreed to.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. DOLE. Mr. President, I ask unanimous consent to proceed as in morning business for the next 15 minutes.

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

Mr. DOLE. I thank the Chair.

(The remarks of Mr. DOLE pertaining to the introduction of S. 770 are located in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

Mr. DOLE. 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. GORTON. 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 President, I ask unanimous consent that the order for the quorum call be rescinded.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. GORTON. Mr. President, I ask unanimous consent that it be in order for me to offer the amendment I have in my hand which the Democrats have also seen and it be in order notwithstanding the provisions of rule XXII. This is the so-called additur fix amendment requested by the White House.

The PRESIDING OFFICER. Is there objection?

Mr. HARKIN. Mr. President, on behalf of Senator HOLLINGS, I object.

The PRESIDING OFFICER. Objection is heard.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. HEFLIN. 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 President, I ask unanimous consent that the order for the quorum call be rescinded.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. HEFLIN. Mr. President, during the course of debate in discussing the breadth of the products liability bill, I mentioned that a nuclear power plant or a component part thereof could be included within the purview of the products liability bill. I also stated that maybe the bill might not cover a nuclear power plant or a component part thereof.

I, in effect, raise two issues: One being the issue of pain and suffering, and the other being the statute of repose. In regard to these issues, I mention the Chernobyl melt-down.

Since that time, my office has been contacted by reliable and informed individuals who feel that I misspoke on this issue.

First, they say the difference between design and operation of the United States and Soviet plants make a Chernobyl-style accident virtually impossible.

Second, they state that the bill would not in any way prohibit compensation for injured parties in the event of a nuclear accident regardless of the time of the manufacture of the plant or components. They particularly point out that Congress has provided a sure and certain recovery system for any member of the public injured as a result of a nuclear power plant accident—the Price-Anderson Act—and, further, that Congress in 1988 increased the amount of funds available for claims to more than $6.8 billion and pledged to review the situation in the case of an accident where more funds were needed to compensate the injured. The nuclear power industry, I am told, has willingly agreed to be assessed up to $63 million against each licensed reactor in order to pay damage claims. The nuclear power industry has met this obligation to provide a clear and reliable source of liability compensation when it is justified.

While I have not researched this issue completely, I do find that following the case of *Klick* v. *Metropolitan Edison Co.* (1986, CA3 Pa) 784 F2d 490, which limited certain damages to an ''extraordinary nuclear occurrence,'' Congress did amend the Price-Anderson Act to include a ''nuclear incident.''

In the exclusion clause of the products liability bill there is a statement to the effect that the bill does not supersede any Federal law.

I have great confidence in the knowledge and reliability of the individuals who have brought this to my attention, and I would like to put the record straight. I will continue to research this matter; and if there is anything different from what I have been told, I will make it known to the Senate.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. DEWINE). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BURNS. 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. BURNS. Mr. President, I ask unanimous consent that I may be allowed to proceed as in morning business for the next 10 minutes.

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

(The remarks of Mr. BURNS pertaining to the introduction of S. 768 are printed in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

UNITED STATES-JAPAN TRADE RELATIONS

Mr. BYRD. Mr. President, I have a Senate resolution which has been cleared with both leaders, and they are both cosponsors. I have the clearance from them to take up the resolution and proceed with its immediate consideration. I therefore send a Senate resolution to the desk and I ask unanimous consent that the Senate proceed to its immediate consideration.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will read the resolution by title.

The legislative clerk read as follows:

A resolution (S. Res. 118) concerning United States-Japan Trade Relations.

The Senate proceeded to consider the resolution.

Mr. BYRD. Mr. President, this resolution is being jointly cosponsored by Senators DOLE, DASCHLE, BAUCUS, REID, ASHCROFT, WARNER, LEVIN, HOLLINGS, PRESSLER, DORGAN, BROWN, and SARBANES.

Mr. President, the long and difficult negotiations between the United States and Japan over United States access to the Japanese automotive market collapsed last Friday, May 5, 1995, in Whistler, Canada. Japan simply cannot kick the habit of a closed automotive market, that is the antithesis of free trade. It is not clear as to whether the Japanese will return to the negotiating table with a changed position, or whether Japan's automakers will themselves announce an agreement with specific measures of progress to allow American products to compete fairly there. Let us hope that they do break the impasse, but this disappointing result of strenuous, long-term efforts by the United States to get fair access to this lucrative market brings us to a watershed in our trading relations with Japan. This blow cannot help our overall relationship with a nation that we have worked with for decades to promote our mutual goals of security, stability, and peace in the Pacific.

My distinguished colleague from West Virginia, Senator ROCKEFELLER, stated on this floor this past Wednesday that the nature of the difficult problem in getting fair access to Japan's market. Japan rigs her market against us, despite economic pressures to be more open. Despite the recent increase in the value of the yen, which would make United States products more competitive in Japan, Japan keeps her market closed to cheaper imports and overprices goods offered to the Japanese consumer. Increased savings which should be passed on to Japanese consumers, resulting from the increased strength of the yen vis-a-vis other currencies are never passed on to the Japanese consumer. The increased profits which are accumulated by Japanese producers are used to subsidize exports, keeping prices for those same goods artificially low here in the United States, making Japan artificially

more competitive. It is a controlled pricing situation, not based on free market principles. The devastating result of these practices in the automotive industry, for both new cars and parts, has been an unacceptably high and persistent trade deficit with Japan.

The result in 1995 was a ballooning record trade deficit with Japan of $66 billion, up 10 percent over 1994, of which $37 billion, or 56 percent of the total is attributable to cars and auto parts. The automotive trade deficit with Japan constituted some 22 percent of our entire trade deficit with the world. American manufacturers cannot get Japanese distributors to put American cars in their showrooms. Overall, while Japanese automakers hold some 22.5 percent of the American market, the share of the Japanese market held by the Big Three United States automakers is less than 1 percent. As for parts, it is extremely difficult for United States parts, which are highly competitive from both a price and value standpoint, to break into the ''Karetsu'' system of interrelationships between Japanese car manufacturers, suppliers and dealers. Despite the fact that United States government studies show that Japanese aftermarket repair parts cost, on average, some 340 percent higher than comparable United States parts, the Japanese consumer is essentially denied the ability to buy those American parts. The result is that Japanese vehicle manufacturers control about 80 percent of the parts market, as compared to a wide-open American market in which independent replacement parts producers account for some 80 percent of the United States market. So, our market is open, Japan's is closed.

These important economic realities are well known to both governments and industry on both sides of the Pacific. The impact on our domestic auto industry is crucial. Every $1 billion of U.S. exports means some 17,000 jobs. The health of our aluminum, glass, steel, rubber, electronics, and many other industries is tied to the auto sector. It is our largest manufacturing industry, with some 700,000 people employed directly by the automakers, and another 2.3 million employed in the parts industry supplying the automakers.

There is extensive support across the board from industry and labor organizations for the current negotiations. They have been grinding on for some 18 months before the stinging Japanese rebuff on Friday in Canada. Last October 1994, our Trade Representative opened an investigation under section 301 of the Trade Act of 1974 of the unfair practices in the aftermarket parts market, which constitutes about a third of the automotive deficit with Japan. The unwillingness of Japan to address this unfair automotive trade balance demands a strong administration response and equally strong supportive actions by this body and American industry, both business and labor. President Clinton and our Trade Representative, Ambassador Kantor, have made it clear that the end of long, long American tolerance and give has now been reached on this issue. On Friday, Ambassador Kantor indicated that the ''government of Japan has refused to address our most fundamental concerns in all areas'' of automotive trade, and that ''discrimination against foreign manufacturers of auto and auto parts continues.'' The President indicated on the same day that the United States is ''committed to taking strong action'' regarding Japanese imports into the United States in the absence of an agreement.

Pursuant to the 301 case, trade sanctions, meaning tariff retaliation against a variety of Japanese goods imported into the United States, are now in order. Such retaliation has been openly discussed regarding these negotiations for months, and so the Japanese are saying, either ''we do not believe you will do it,'' or ''we do not care,'' or, lately, that ''you cannot impose sanctions under the 301 law bilaterally on Japan because it is illegal under the newly created World Trade Organization rules.''

Mr. President, the stakes of these automotive negotiations and U.S. actions under 301 are very high. The auto trade is very lucrative, and thus there is a major financial stake. But there is more at stake than money here. At issue is whether nontariff barriers, discriminatory treatment by foreign economic interests, aided by a maze of regulatory, bureaucratic obstacles to open trade, will dominate large sectors of international trade. As opposed to an open United States market, our major Asian trading partners practice wide discriminatory treatment against our goods. China and Korea appear to be taking a cue from Japanese behavior and the apparent success of these unfair practices. Other sectors will continue to follow suit, such as the highly explosive and rich trade in telecommunications, where we are experiencing similar problems.

The inability of our two nations to resolve our differences on trade in a way which demonstrates a real commitment to fairness by Japan will inevitably corrode our overall relationship. It is unrealistic to expect to insulate the costly effects to the U.S. economy, to jobs, and the health of so many of our important industries from the total relationship. Our economic health is critical to our national security and to our staying power as the key deployed military power in the Pacific. It all hangs together. The fabric of our economic health and Japan's national security is a seamless web, and a strong United States auto industry is an important strand in that web. I hope the Japanese will come to understand that this is all interrelated.

The Japanese have threatened to bring a case against United States imposition of sanctions under section 301 before the World Trade Organization, in the hope the WTO would rule against the United States and declare the imposition of sanctions a violation of WTO rules. I am gratified that Ambassador Kantor has said he would welcome such a challenge, because, according to his comments in the New York Times of May 7, 1995, ''it would give us an opportunity to make clear to the world the full range of Japan's discriminatory practices'' in the automotive market. I hope Japan does bring the case to the WTO. I am fully confident that our Trade Representative would conduct a vigorous defense of United States actions, and turn the tables against the Japanese, whose trade sanctuary regime is anathema to the goal of an open world trading system. We should insist on a complete review of Japan's practices. Either we are heading toward a more open world system or we are not. This would be a litmus test of the actions and posture of the WTO. It would be a key test of the future of the WTO. I cannot conceive of continued U.S. commitment to an organization that would reward blatant discrimination and the perpetuation of sanctuary behavior. Thus, the case would be a welcome, early test of what kind of world organization we have created.

Mr. President, I am offering this resolution as a sense-of-the-Senate resolution that puts the Senate on record as supporting the President's actions. First, it expresses the Senate's regret that negotiations between the United States and Japan for sharp reductions in the trade imbalances in automotive sales and parts, through elimination of restrictive Japanese market-closing practices and regulations have collapsed. Second, it states, if negotiations under section 301 of the Trade Act of 1974 fail to open the Japanese auto parts market, the United States Senate strongly supports the decision by the President to impose sanctions on Japanese products in accordance with section 301.

There is still opportunity for Japan to return to the negotiating table and satisfy the legitimate case of the United States that immediate action to open Japan's market is urgently needed. I hope the Japanese see the light before it is too late. There are press reports that the Japanese think we may shrink from the imposition of sanctions. I hope that we here in the Senate will send a strong message of support for the President on this matter, and help disabuse the Japanese of that view.

Mr. President, I yield the floor.

(Ms. SNOWE assumed the chair.)

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the majority leader.

Mr. DOLE. Madam President, I am a cosponsor of the resolution. I thank my distinguished colleague from West Virginia for adding me as a cosponsor of the resolution. I think it is very timely

and very important. I hope my colleagues will strongly support the efforts of Senator BYRD in this area.

This resolution is not an example of Japan-bashing. The United States has now negotiated in good faith for 2 years in this administration. Previous administrations tried to pry open the Japanese auto market through serious negotiation. The results have been disappointing, at best.

Congress has passed market-opening trade laws because U.S. negotiators have needed effective tools. They are there to be used, if negotiations fail. They are not empty threats.

Section 301 is not a threat, it is an effective tool. I happen to believe Ambassador Kantor has wielded this tool responsibly.

That is why, if a negotiated solution cannot be found, I support the use of section 301 to impose appropriate sanctions.

Madam President, this would be strong medicine. Some people might not like it. Some people might think it disruptive.

But there has always been bipartisan agreement that the United States must pursue more open markets. We have always provided leadership on this issue, and we will continue to do so.

There comes a time in every trade negotiation, when all other means have been exhausted, to take strong, decisive action. That time may have come, Madam President, if a last minute solution cannot be found. I urge my colleagues to support this sense-of-the-Senate and stand up for American commercial interests abroad.

In my view, if nothing else, a strong vote on this resolution will send an urgent message to the negotiators, more particularly the Japanese negotiators, that we are serious, we mean business, we stand behind the administration and their efforts to break the logjam.

So I encourage my colleagues on both sides of the aisle to support the sense-of-the-Senate resolution.

I ask unanimous consent that Senator SPECTER be added as a cosponsor.

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

Mr. BYRD. Madam President, I thank the distinguished majority leader for his cosponsorship and for his fine statement. I believe we would like to have the yeas and nays.

Mr. DOLE. Madam President, I ask for the yeas and nays on the resolution.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. BRADLEY. Madam President, I rise to explain my opposition to this resolution. Although this resolution calls attention to a serious problem, the persistence of Japanese trade barriers, it does not identify a workable solution.

Japanese trade barriers need to come down. They need to come down because they contribute to America's bilateral trade deficit with Japan. Studies cited by the administration have found that removing every single Japanese barrier would reduce the bilateral merchandise trade deficit by around 20 percent.

Note, however, that Japanese trade barriers do not themselves account for America's global trade deficit, only its composition. As the administration itself admits in the President's 1994 annual report on the Trade Agreements Program:

> The United States still suffers from relatively low savings at a time when domestic investment is growing rapidly. The shortfall between domestic saving and investment was larger in 1994 and was filled by a net increase in foreign capital inflows. The United States thus had a large surplus on its international capital account and a large offsetting deficit on its trade or current account.

In plain English, our domestic budget deficit crowds out savings and requires us to import capital. This leads to our global trade deficit.

Japanese trade barriers also need to come down because they reduce the Japanese people's quality of life and impede the process of democratization in Japan. Japan's democratization is also in our interest; it is the only way we will have a stable, democratic, prosperous Japanese partner in our efforts to secure a stable international environment.

So, on this point, we agree, Japan's trade barriers must come down.

However, the administration's strategy, which this resolution supports, is the wrong way to do this. Declaring unilateral trade war on Japan—and, make no mistake, that is what we are talking about—would once again leave the United States isolated in the world. Europeans, Latin Americans, and Asians, fearing similar treatment from us in the future, would line up with Japan.

Currency markets will react badly. If you think a rate of 80 yen to the dollar is disadvantageous to this country, as I do, imagine a rate of 75 or even 70. I am not alarmist when I say that this could threaten the position of the dollar as the international reserve currency. Indeed, Japan is already talking of switching its reserves out of dollars and into deutschmarks.

This dispute is likely to end in the fledgling World Trade Organization. No matter what happened there, support would be weakened. Either the United States would lose, causing a tidal wave of calls to leave the World Trade Organization, or Japan would lose, leading to reduced Japanese support for the international trading system. Either way, we all lose.

Finally, by strengthening the power of the bureaucrats, who are standing up to the Americans, a trade war would cut across the forces of transparency, democratization, and accountable electoral politics which are the ultimate answer to our trade imbalance.

I have spoken many times of a better way to reduce Japan's trade barriers, one that works with the forces shaping Japan, does not cut across our interests in the new World Trade Organization, and depoliticizes the trade relationship. To repeat, I believe we can best address Japan's trade barriers by establishing a dispute resolution mechanism, similar to the ones in the United States-Japan and United States-Canada free trade agreements, to impartially adjudicate United States-Japan trade disputes.

Madam President, it is ironic that we are voting on this resolution. In many ways, it is like judo. What appears strength is actually revealed as weakness.

I, for one, believe in strength. This is why I believe we must take a strategic, long-term approach to the United States-Japan trade relationship. A strong America will negotiate and adjudicate, as I have described. A weak America will only, impotently, bash.

The PRESIDING OFFICER. Is there further debate on the resolution? If not, the question is on agreeing to the resolution. The clerk will call the roll.

The bill clerk called the roll.

Mr. LOTT. I announce that the Senator from Minnesota [Mr. GRAMS], the Senator from Pennsylvania [Mr. SPECTER], and the Senator from Virginia [Mr. WARNER] are necessarily absent.

Mr. FORD. I announce that the Senator from New York [Mr. MOYNIHAN] is necessarily absent.

The PRESIDING OFFICER (Mr. COATS). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 88, nays 8, as follows:

[Rollcall Vote No. 158 Leg.]

YEAS—88

Abraham	Exon	Lugar
Akaka	Faircloth	Mack
Ashcroft	Feingold	McConnell
Baucus	Feinstein	Mikulski
Bennett	Ford	Moseley-Braun
Biden	Frist	Murkowski
Bingaman	Glenn	Murray
Bond	Gorton	Nickles
Boxer	Graham	Nunn
Breaux	Gramm	Pell
Brown	Grassley	Pressler
Bryan	Gregg	Pryor
Bumpers	Harkin	Reid
Burns	Hatch	Robb
Byrd	Heflin	Rockefeller
Campbell	Helms	Roth
Chafee	Hollings	Santorum
Coats	Hutchison	Sarbanes
Cochran	Inhofe	Shelby
Cohen	Jeffords	Simon
Conrad	Kempthorne	Simpson
Coverdell	Kennedy	Smith
Craig	Kerrey	Snowe
D'Amato	Kerry	Stevens
Daschle	Kohl	Thomas
DeWine	Lautenberg	Thompson
Dodd	Leahy	Thurmond
Dole	Levin	Wellstone
Domenici	Lieberman	
Dorgan	Lott	

NAYS—8

Bradley	Johnston	McCain
Hatfield	Kassebaum	Packwood
Inouye	Kyl	

NOT VOTING—4

Grams	Specter
Moynihan	Warner

So the resolution (S. Res. 118) was agreed to.

The preamble was agreed to

The resolution, with its preamble, is as follows:

S. RES. 118

Whereas, the United States and Japan have a long and important relationship which serves as an anchor of peace and stability in the Pacific region;

Whereas, tension exists in an otherwise normal and friendly relationship between the United States and Japan because of persistent and large trade deficits which are the result of practices and regulations which have substantially blocked legitimate access of American automotive products to the Japanese market;

Whereas, the current account trade deficit with Japan in 1994 reached an historic high level of $66 billion, of which $37 billion, or 56 percent, is attributed to imbalances in the automotive sector, and of which $12.8 billion is attributable to auto parts flows:

Whereas, in July, 1993, the Administration reached a broad accord with the Government of Japan, which established automotive trade as one of 5 priority areas for negotiations, to seek market-opening arrangements based on objective criteria and which would result in objective progress;

Whereas, a healthy American automobile industry is of central importance to the American economy, and to the capability of the United States to fulfill its commitments to remain as an engaged, deployed, Pacific power;

Whereas, after 18 months of negotiations with the Japanese, beginning in September 1993, the U.S. Trade Representative concluded that no progress had been achieved, leaving the auto parts market in Japan ''virtually closed'';

Whereas, in October, 1994, the United States initiated an investigation under Section 301 of the Trade Act of 1974 into the Japanese auto parts market, which could result in the imposition of trade sanctions on a variety of Japanese imports into the United States unless measurable progress is made in penetrating the Japanese auto parts market;

Whereas, the latest round of U.S.-Japan negotiations on automotive trade, in Whistler, Canada, collapsed in failure on May 5, 1995, and the U.S. Trade Representative, Ambassador Kantor, stated the ''government of Japan has refused to address our most fundamental concerns in all areas'' of automotive trade, and that ''discrimination against foreign manufacturers of autos and auto parts continues.''

Whereas, President Clinton stated, on May 5, 1995, that the U.S. is ''committed to taking strong action'' regarding Japanese imports into the U.S. if no agreement is reached. Now, therefore, be it

Resolved, That it is the Sense of the Senate that—

(1) The Senate regrets that negotiations between the United States and Japan for sharp reductions in the trade imbalances in automotive sales and parts, through elimination of restrictive Japanese market-closing practices and regulations, have collapsed;

(2) If negotiations under Section 301 of the Trade Act of 1974 fail to open the Japanese auto parts market, the United States Senate strongly supports the decision by the President to impose sanctions on Japanese products in accordance with Section 301.

Mr. BYRD. Mr. President, I move to reconsider the vote by which the resolution was agreed to, and I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. BYRD. 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. Madam 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. 693 TO AMENDMENT NO. 690

(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. Madam President, I have an amendment at the desk—No. 693, I believe it is.

The PRESIDING OFFICER. 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 693 to amendment No. 690.

Mr. SHELBY. Madam President, I ask unanimous consent that reading of the amendment 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, as of the effective date of this Act, 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 without regard to this section, but only during such time as the State law so provides.

Mr. SHELBY. Madam President, I offer today on behalf of myself and the senior Senator from Alabama [Mr. HEFLIN] an amendment to ensure that individuals guilty of wrongful deaths are not provided unfair and unwarranted protection by the product liability reform legislation we are considering today.

This amendment we are offering was accepted last week by both sides but was excluded from the Gorton-Rockefeller-Dole amendment today. I believe that all of my colleagues will support this measure once they take time to examine its merits. It is unique to the State of Alabama. My State of Alabama has a wrongful death statute, the damages of which are construed as only punitive in nature—not compensatory but only punitive in nature. Under the product liability bill that we are considering today, 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. While the bill here allows for additur, the additur procedures in this legislation are cumbersome at best and possibly unworkable.

Madam President, in 1852, I believe it was, 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 a measure of damages in wrongful death cases in Alabama as it possibly is in other States. The entire focus of Alabama's wrongful death civil action is on the cause of death.

The amendment I am offering today on behalf of myself and Senator HEFLIN will provide that in a civil action where the alleged harm to the claimant is death and the applicable State law only allows for punitive damages, the punitive damages provision of this bill will not apply. In other words, this amendment will only apply to my State of Alabama.

Madam President, I believe there are legitimate reasons to exclude from the coverage of this bill actions such as those brought under Alabama's wrongful death statute. Cases of wrongful death are often some of the most legitimate instances where punitive damages should be awarded.

Everyone in this body knows that I have great reservation about this legislation now before us. However, I do believe the addition of this amendment will help ensure that this bill will not unduly, not unduly, Madam President, penalize the citizens of my State.

I urge my colleagues to support this important amendment.

Mr. HEFLIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. HEFLIN. I join with the distinguished Senator from Alabama [Mr. SHELBY] in his amendment.

Of all of the 50 States, Alabama has a different method pertaining to the recovery of damages when a death occurs as a result of culpable action, regardless of whether it be simple negligence, gross negligence, willful conduct, intentional conduct, wanton conduct, any type of conduct that allows for the recovery. It allows under the interpretation given for this statute that punitive damages only can be recovered. It is different from other States where most of the other States allow a plaintiff, the executor or the administrator or the parent of the child, if deceased, to be able to introduce, for example, hospital bills.

A person may have died after 6 months in a hospital, and under hospital bills of today they can accumulate to over $150,000. Burial expenses in most States can be introduced into evidence and can be an element of compensatory damages. Loss of earning capacity, noneconomic damages, pain and suffering in some instances in some States can be introduced as an element

of damages, and so on down the list of all of the types of damages.

But in Alabama you are not allowed to introduce any of that. You attempt to introduce a hospital bill, and a doctor's bill, and whether they were $150,000 or whether, on the other hand, they amounted to $500 or $25, you cannot introduce that in evidence as an element of damages under the Alabama wrongful death statute as has been interpreted, and the charge to the jury is that it is a matter of punishment for the wrongdoer, and therefore it is limited to that.

Over the years, the companies, corporate America, in Alabama, insurance companies, defense counsel who represent them, have fought to maintain this, and over the years the plaintiffs' lawyers have come to live with it, and therefore it is accepted as being the measure of damages.

However, under the provisions that we have here under this bill in product liability cases the provisions pertaining to this would apply. And under the DeWine amendment, you would be limited in a situation with regard to that to almost zero, where there would be nothing that could be recovered, and it would limit it, restrict it substantially.

So I support the Shelby amendment in this regard. This is a situation that applies only to Alabama. The language of this bill is basically the same language that was considered in the 101st Congress and in the 102d Congress. They came out of the Commerce Committee. We had pointed this defect out, and the drafters of the bill, including people who had been working on product liability, put a provision in those bills that would allow for the Alabama law to prevail. We offered it as an amendment in regard to the Gorton and Rockefeller underlying substitute, and it was accepted after they made some changes in the language. Senator SHELBY and I are agreeable to any changes in the language of the Shelby amendment that they might want to propose provided it allows for recovery—it is limited strictly to the wrongful death cases, and therefore we are amenable to any change that they might make as long as it does not abolish, or greatly minimize the recovery under the Alabama statute.

So we feel that this is something which should be adopted. Otherwise, it is singling out Alabama, and Alabama has a very unique, they argue, uniformity, and the preemption matters ought to be uniform among all of the 50 States. But what it means is that in the preemption which does bring about some uniformity as it would apply to the preempted sections, that it will not apply to Alabama. And it is a very discriminatory act in regard to Alabama. I would think that it has, from a Federal constitutional basis, some imperfections in regard to it.

I urge my colleagues in the Senate to support the Shelby-Heflin amendment.

AMENDMENT NO. 693, AS MODIFIED

Mr. SHELBY addressed the Chair.

The PRESIDING OFFICER (Mr. GRAMS). The Senator from Alabama.

Mr. SHELBY. Mr. President, I ask unanimous consent to amend the amendment that I have filed that is the subject of debate.

I send the modification to the desk.

The PRESIDING OFFICER. Is there objection to the modification?

Mr. HOLLINGS. Reserving the right to object. That is a modification to the Senator's amendment?

Mr. SHELBY. The Senator is correct. It just clarifies this amendment. I mention in the amendment section 107. That is all it does.

Mr. HOLLINGS. The distinguished Senator from Washington and I had a discussion about another amendment. I am sitting around making sure that unanimous consent is not given for that amendment.

Mr. GORTON. This is not that amendment.

Mr. HOLLINGS. I thank the Senator. I have no objection.

The PRESIDING OFFICER. Without objection, the amendment is so modified.

The amendment (No. 693), as modified, 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, as of the effective date of this Act, 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 without regard to section 107, but only during such time as the State law so provides.

Mr. HEFLIN. I assume section 107, I ask Senator GORTON, is the section dealing with punitive damages.

Mr. GORTON. It is.

Mr. HEFLIN. So it is limited to that. But does that include the DeWine amendment and language in regard to small business, and the individual relative to the $500,000?

Mr. GORTON. It does. That is in section 107, as well.

Mr. HEFLIN. That is all included in section 107, all punitive damages?

Mr. GORTON. It is.

I simply pointed out to the distinguished junior Senator from Alabama that the way the amendment was set up it did not have any reference to any section, but it was about punitive damages. His correction is to see to it that it applies to the punitive damages section. But that is the section that has all the punitive damages in it.

Mr. HEFLIN. I thank the Senator.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. Mr. President, I regret that I have to oppose the amendment sponsored by the two Senators from Alabama. In some respects, I am sorry that I have to do so, but I believe that I have good and sufficient reasons for doing so.

First, the senior Senator from Alabama said that this was included in previous product liability bills, which is certainly true. But those previous product liability bills did not have rules like this relating to punitive damages.

Mr. HEFLIN. Did not have what? I did not understand the Senator.

Mr. GORTON. There were no DeWine amendments and there were no Snowe amendments in previous bills.

Second, this is, Mr. President, to be candid, a very peculiar rule in the State of Alabama where negligence is accounted to be the subject of punitive damages. It is not the rule in any other State in the Union.

Nothing in this bill, without this amendment, prevents Alabama from providing any kind of damages for wrongful death that it wishes to, either through its legislature or through its court interpretations. So Alabama is not going to be penalized any more than any other State by this bill unless Alabama wants to be, and willfully refuses to conform its laws to those of other States.

But, more significant than that, Mr. President, are two other features about this amendment. The first, one of the most carefully worked out elements in this entire bill, the most carefully worked out element in this bill, is the triple set of requirements we have with respect to punitive damages, one of which, in the ultimate analysis, allows judges to impose unlimited punitive damages when they find the conduct of the defendant to have been sufficiently egregious. The second is the Snowe amendment which, in most cases, will limit punitive damages to twice the total amount of all compensatory damages. And the third, Mr. President, is the fact that this body, I think, with a wide majority, determined that we were not going to allow punitive damages in a single case simply to destroy small businesses or individuals of relatively modest assets, with total assets of less than $500,000.

Now, if this amendment passes, that will be the rule in 49 States—in 49 States, Mr. President. It will not be the rule in Alabama. In Alabama, there will not be any Snowe limitation in general cases, and there will not be any protection for small businesses or for individuals with net assets of less than half a million dollars.

Mr. President, this is only 1 State out of 50, but Alabama is the single most notorious State in the United States of America related to its size for punitive damage awards. It is a cottage industry in that State to award very, very large, huge punitive damages awards against, generally speaking but not necessarily limited to, out-of-State corporations.

So what we are saying is that the set of rules that we have adopted, in most of these cases by very large majorities in this body, will apply in every State except the State that comes first in the alphabet, Alabama, and none of the

limitations will apply in the State of Alabama. Why? Because it has a peculiar law which can be changed by one word by its State legislature or, for that matter, by its supreme court. And we are going to do this, for all practical purposes, permanently.

Finally, Mr. President, a profound change has taken place in this body since the time this amendment was first proposed in this debate. When it was first proposed in this debate, the absolute maximum for punitive damages was the Snowe amendment—twice compensatory damages—which, as the two Senators from Alabama pointed out, under this peculiar Alabama law, would be zero. And, of course, twice zero is zero. So that is no longer the case.

So the bill, the way it exists now, the way it has been amended now, allows the judge in any case on certain findings to impose punitive damages in unlimited amounts. That, in the bill as it exists now, without this amendment, of course, applies in Alabama, and will allow those Alabama judges to impose whatever they wish, if they meet the standards for punitive damages, themselves. So at that level, at least, this proposal is entirely unnecessary in a way that was not the case or not the argument just a few days ago in this bill.

So even if Alabama is perverse enough to keep its law in its present peculiar fashion, this will not mean that there cannot not be any recovery in wrongful death cases. But if it is passed, we set one rule for Alabama in which everything is the sky is the limit in a State where the sky is higher already than it is in any other State in the Nation, and a quite different rule for 49 other States.

Mr. President, that is absolutely unfair; that is profoundly unfair that this State, because of one peculiar rule, should be exempted from all of the rules which the great majority of Members here have said are appropriately applied to all of the States.

Mr. SHELBY addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SHELBY. Mr. President, I will be brief.

I would just like to say again, I believe it was in 1852, the Alabama Supreme Court decreed that there would be, in a wrongful death action, punitive damages only, and that has worked in my State since 1852. That is one reason I oppose all of this legislation.

Every State has different problems. Alabama, my State, is unique as far as measuring the wrongful death damages. They do it by punitive damages. It is not anything new. It goes back way over 100 years. But it has worked. It has worked for my State. This would only deal in wrongful death cases, nothing else. All we are asking the Senate to do is to preserve what we have and what we have had for over 100 years.

Mr. HEFLIN addressed the Chair.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. HEFLIN. Mr. President, I am rather surprised to hear my good friend from Washington, who has long been an advocate of federalism, come forward with language from the screaming Federal Eagle over States saying: ''Alabama, you change your law or else you don't get even peanuts.''

In other words, this is federalism in reverse, the big Federal Government that we have heard so much about telling the Alabama Legislature and the Alabama courts, ''You change your law.'' Now you have preemption that takes place. This is a mandate as to whether a claimant is going to recover or not.

I am rather surprised that we would hear that language coming from such a strong supporter of the concept of federalism. If the Federal Government is going to tell a State you do this or not, we usually give them a carrot or some type of incentive. But my colleague's position is, to me, an example of brute force—''you change your law or you're not going to be able to protect your people.''

Then we have the additur provision pertaining to the judge. Clearly, that is unconstitutional. The Supreme Court of the United States, in the case of Dimick versus Schiedt, has already ruled on that issue. In practice what will occur is where an additur is made by the judge but the defendant does not want to accept the new amount, the defendant or defendants will request a new trial. However, that is what appeals are for—new trials.

So, automatically a defendant will ask for a new trial if he does not like what the judge added to the judgment. If the judge, therefore, feels that the punitive damage award was inadequate, because the defendant's conduct was extremely egregious and the plaintiff's injuries were great, the judge could award additional punitive damages.

In the normal course of events, when the judge adds that to the damage award, a defendant takes an appeal to reverse it where he could get a new trial. But, the punitive damages provisions of this bill give defendants the automatic opportunity to request a new trial.

Well, what defendant is going to not take advantage of it? Every defendant is going to say, ''Give me a new trial. I can keep my money, draw interest on my money in the meantime, and delay a new trial for 2 years.'' Therefore, if the overall award was $300,000, and if the judge added to it above the $250,000 cap that is in this bill, the defendant takes its $300,000 and draws interest or makes investments with it.

Defendants are going to follow that course of action with the idea also that they have to go back to a new trial which means that every issue will have to be litigated all over again. There is not much to lose in following this course of action. So automatically you are going to find that every defendant is going to demand a new trial. What happens? A defendant knows he is not going to get any more than what was originally put in the judgment, the amount he put there. Then it comes back to the judge again and the judge says, ''Well, I believe that that conduct was so egregious and find this is a terrible case and that the defendant ought to be punished, and therefore, I will again make an additur.''

What does the defendant say? ''Well, I have under this bill automatically a right to a new trial, and I demand a new trial.'' So the defendant delays it 2 more years, draws his interest, and makes his investments in the meantime.

Then he goes back and retries it and gets the same judgment. Then the defendant says, ''All right, I'm going to take advantage of my opportunity for a new trial'' and receives a new trial. So the case is tried a third time and, finally, the plaintiff says, ''It doesn't make any difference what the judge adds, there is no way in the world that I can collect it, and I just have to give in, there is nothing I can do.'' The judge and the jury felt that defendant's conduct was egregious and met the extremely high standards of this bill. However there is no way under this language that a defendant can ever recover because instead of having the normal event of trying to reverse a case on appeal and have a new trial, the defendant just has an automatic right to a new trial on punitive damages.''

When you think about it, the situation is just plain ridiculous. I think Alabama's legislature and its courts have the clear right to determine that its wrongful death statute is to be punitive in nature only, recognizing the sacredness and value of human life. The concept of federalism that every State has its right to choose its laws ought to respect that right of my state. But here we have the American Federal Government imposing, and intruding, and saying: ''All right, you can't recover for the death of an Alabamian or the death of a Washingtonian if you are traveling in Alabama or any other individual that might be there.''

What we are asking is, let us allow federalism to prevail, and if the State of Alabama wants to, it can continue to recognize the validity of its wrongful death statute which is designed to protect its citizens by making it of a punitive nature only.

I yield the floor.

Mr. GORTON addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington.

Mr. GORTON. Mr. President, very briefly on the subject. No, I say, Mr. President, nothing in this law limits the State of Alabama from providing unlimited compensatory damages in the case of wrongful death. It is Alabama that has said that it will not grant compensatory damages in the case of wrongful death, and Alabama

can change that at any time that it wants. Nothing in this bill puts any limit on compensatory damages awarded by courts in the State of Alabama for wrongful death; absolutely nothing.

What this bill does do is to take a modest step toward bringing under a certain degree of control punitive damages with rules for small business, rules for larger organizations and an exception when a judge wishes to go above any of the latter limitation. That is all. This amendment seeks for a single State to be totally exempt from that rule, therefore, in the view of this Senator is wrong.

Mr. President, I am going to suggest the absence of a quorum because it is my hope that we are about to reach a unanimous consent agreement on all of the rest of the amendments that are to be offered and perhaps a chance to vote on them all and on final passage of this bill the same time tomorrow and serve the convenience of our colleagues. And so I will do that in just a moment, though I do not want to limit anyone else having a right to say something.

I do need to say two other things. First, with respect to this constant new trials for large punitive damage awards, the Senator from West Virginia considered that last night, worked with his friends and supporters on his side of the aisle on that subject last night and worked with staff on this side. We agreed to take that section or subsection out of the bill. Because of cloture rules, we can only do that by unanimous consent. Opponents of the bill—Senator HOLLINGS—have refused that unanimous consent.

I am here publicly to assure all Members that it will not appear in any bill coming out of conference, because Senator ROCKEFELLER and I have made that commitment. We will not bring back a conference report with that proposal in it. We wish that we could have the courtesy of such unanimous-consent agreement. But we cannot, and they are certainly operating under the rules. But it is not going to appear in any final bill. We can assure them of that.

With that, Mr. President, hoping that we will soon be able to reach a unanimous-consent agreement about votes, I will suggest—I withhold that.

Mr. ROCKEFELLER addressed the Chair.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. ROCKEFELLER. Mr. President, my distinguished colleague from Washington just made a very, very important point, one which he and I have already made in public at a press conference which we held several hours ago, and that is that we are, in spite of the fact that the Senator from South Carolina, my esteemed, cherished ranking member of the Commerce Committee—who is a very good friend and has been, and his wife and my wife for a long, long time—does not wish to give consent for us to be able to do this—I think with the idea being that if he does not give consent, then the chances that this bill would be less attractive to the White House would increase.

Senator GORTON and I are trying to make this more attractive to the Members of the Senate, Members of the House, and the White House. But I have also taken the same blood oath that the Senator from Washington has, and that is that we are so committed in terms of the additur amendment that we will not come back from conference without its being in the proper condition, and that, in fact, if it does not come back from conference in the proper condition, as we said at our press conference, we will vote against a motion for cloture.

I do not know how it is possible for any two floor managers to put anything in stronger terms, or to say anything with greater faith and, therefore, it grieves me very much that we will not be granted unanimous consent to do that here when we are being so direct and honest and forthright with our colleagues.

There were just timing problems in terms of submitting this, or else the amendment would have been filed and could have been brought up as a matter of the order. Nevertheless, that was not done. The Senator from South Carolina does have the power to grant us unanimous consent, but he chooses not to do so.

Mr. President, I also want to simply indulge my colleagues in a couple of thoughts, to make some comments on the discussion here about the section in the compromise now pending. We are there. It deals with punitive damages. No. 1, the whole section is the result of many, many months of negotiation and discussion on, in fact, how a product liability reform bill might best deal with the costs and the problems and the erratic nature which we all recognize is at play—punitive damages.

I have tried to represent the Clinton administration's discomfort—expressed discomfort—with the idea of imposing a flat cap on punitive awards, while accommodating the strong desires of Senators on both sides of the aisle to include some reform in this bill, to pursue the idea that the punishment impleaded in punitive damages should have some sense of connection, in fact, to the crime.

I also have to say that in my own personal experience, I do not like to vote for caps. I am on the Finance Committee, and when medical malpractice was before us last year and there was a vote on a cap on noneconomic damages, I voted against it. I do not like caps. It has been my own personal purpose in which I have negotiated in good faith with Members of my own party and the other party to find a way to make sure that the cap would be uncapped. I think we have done that. The Senator from South Carolina knows that. And I say this with respect because he is within his rights and he is a very skilled legislator and a very good friend. I repeat that. He understands that we are, in fact, trying to improve the bill in a way which would appeal to virtually all Members on my side of the aisle, including, in fact, in truth, I believe the Senator from South Carolina himself, because it would be a better amendment with the judge additur provision refined and nobody could dispute that.

It would be better than simply two times compensatory damages with an alternate ceiling of $250,000 because one can construe that—although one can never guess what noneconomic damages will be—one can construe that, in theory, to be a cap. So I have been trying my best in negotiating with both sides to try and get that out and have succeeded. I have some sense of accomplishment in that, which is now being put aside by the Senator from South Carolina.

Mr. President, I also want to make a correction for the record regarding the discussions of the constitutionality of the judge additur provision in the Gorton-Rockefeller amendment.

The judge additur provision in section 107 (b) of our amendment, as it exists now, creates a right to a new trial for defendants if they do not accept the additional punitive awards set by the judge. This provision was inserted to address a perceived constitutionality concern with the judge additur provision—perceived. Senator GORTON and I are now in agreement that this right to a new trial provision is in fact unnecessary to meet any constitutionality test.

The Associate Attorney General, in several conversations with my staff, has asserted that he believes the judge additur provision in Senator GORTON's and my amendment is constitutional on its own—free standing—without the provision creating a right to a new trial for the defendant should the defendant object to an award which results from the judge additur provision.

Indeed, the Department of Justice prepared a list of precedents and authorities for judicial determinations of the amount of punitive damages which I ask unanimous consent to have printed in the RECORD.

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

AUTHORITIES WHICH SUPPORT THE CONSTITUTIONALITY OF REQUIRING JUDGES TO DETERMINE THE AMOUNT OF PUNITIVE DAMAGES

SOME OF THE CASES

Tull versus United States, 481 U.S. 412 (1987), held it did not violate the Seventh Amendment to have a judge determine the amount of a civil penalty under the Clean Water Act. The Supreme Court indicated that ''[n]othing in the Amendment's language suggests that the right to jury trial extends to the remedy phase of a civil trial.'' 481 U.S. 426 n.9. It also reasoned that ''highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties * * * These are the kind of calculations traditionally performed by judges.'' 481 U.S. at 427.

Smith versus Printup, 866 P.2d 985 (Kan. 1993), upheld the constitutionality of Kansas

Stat. §60–3701, which requires courts to determine the amount of punitive damages. The Kansas Supreme Court reasoned: ''Because a plaintiff does not have a right to punitive damages, the legislature could, without infringing upon a plaintiff's basic constitutional rights, abolish punitive damages. If the legislature may abolish punitive damages, then it also may, without impinging upon the right to trial by jury, accomplish anything short of that, such as requiring the court to determine the amount of punitive damages * * *''

Federal statutes. Various existing federal statutes require judicial assessment of punitive damages. See Petroleum Marketing Practices Act (PMPA), 15 U.S.C. §2805(d)(2); Fair Credit Reporting Act, 15 U.S.C. §1681n(2); Patent Act, 35 U.S.C. §284; Equal Credit Opportunity Act, 15 U.S.C. §1691e(b). None of these statutes has ever been held unconstitutional See Swofford versus B & W, Inc., 336 F.2d 406 (5th Cir. 1964) (holding that plaintiffs in patent action were not entitled to jury trial on issues of exemplary damages).

Courts have also upheld judicial determination of punitive damages in a variety of other contexts. See, e.g., Tingely Systems, Inc versus Norse Systems. Inc., 49 F.3d 93 (2d Cir. 1995) (holding that remittitur of jury verict was not reversible error because judge was entiteld to determine punitive damages under the Connecticut Unfair Trade Practices Act).

SOME OF THE COMMENTATORS

Dean Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 Ala. L. Rev. 975, 1005 (1989). (''Under a traditional legal analysis, punitive damages are more analogous to fines than to damages. The determination of the appropriate amount of a fine is traditionally treated as a question of law, hence an issue for the judge, and not a question of fact for the jury. By analogy, the judge, not the jury, should decide the amount of a punitive damage award * * *'')

Victor E. Schwartz & Mark A. Behrens, The American Law Institute's Reports' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform, 30 San Diego L. Rev. 263 (1993) (''Some critics have challenged judicial assessment of punitive damages as a violation of a defendant's right to jury trial under the Seventh Amendment * * * This criticism is unlikely to hold up if asserted in court. In the past, defendants in criminal cases have challenged judges' activity in sentencing as a violation of their Sixth Amendment right to a jury trial. The Supreme Court, however, has held that no violation exists because sentencing is not a determination of guilt or innocence.* * *[A] criminal defendant's Sixth Amendment right to trial by jury is given a broader scope than a civil defendant or plaintiff's rights under the Seventh Amendment. Thus, we believe that [judicial determination] is constitutional under the Seventh Amendment.'')

Robert W. Pritchard, The Due Process Implications of Ohio's Punitive Damages Law A Change Must Be Made, 19 U. Dayton L. Rev. 1207 (1994). (''Because assessing the amount of civil penalties is not a fundamental element of the right to trial by jury and because judges are better able to perform the highly discretionary calculations of punitive damage assessments, the statutory mandate of judicial assessment of punitive damages awards is constitutional.''

Colleen P. Murphy, Integrating the Constitutional Authority of Civil and Criminal Juries, 61 Geo. Wash. L. Rev. 723 (1993). (''The Constitution should not be deemed to guarantee jury calculation of punitive damages, just as it does not guarantee jury participation in either civil penalty assessment or in certain aspects of sentencing. Federal courts therefore will not violate the Seventh Amendment if they enforce legislation that * * * authorizes judges to calculate awards.'')

Jonathan Kagan, Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines as a Model for Punitive Damage Reform, 40 U.C.L.A. 753, 767–68 (1993). (''While it seems clear that there is a right for juries to determine if plaintiffs have met their evidentiary burdens, it seems clear whether this right extends to the calculation of damages. The Supreme Court resolved this issue in Tull. It held that the defendant was entitled to a jury trial on the issue of liability, but not on the issue of civil damages.'')

Stanley L. Amberg, Equivalent and Claim Construction: Critical Issues En Banc in the Federal Circuit, P.L. Inst. (1994) (''Consistent with the right under the Seventh Amendment to have a jury determine entitlement to punitive damages, * * * Congress may authorize judges to assess the amount of punitive damages or civil penalties.'')

Mr. ROCKEFELLER. This list sets the precedents and authorities supporting the constitutionality of requiring judges to determine the amount of punitive damages. And is therefore valuable information to be considered in this debate.

I rely on the word and the integrity of the Associate Attorney General and his staff at the President's Justice Department. They believe, as I have indicated, that a freestanding judge additur provision as it is written in the Gorton-Rockefeller amendment, and we would like to modify it by striking section 107(b)(3)(C), passes constitutional muster. I have said that several times purposely.

In my view, as an author of this legislation, that is sufficient authority to say that a severability amendment regarding additur is superfluous.

To reiterate, relying on the Justice Department's determination that a judge additur provision is constitutional, I do not believe it is necessary to further amend this provision to sever the judge additur requirements of this bill in an effort to guard against a circumstance where this provision would be deemed unconstitutional. It will not be deemed unconstitutional for the reasons I have articulated.

Mr. President, I just want to take this opportunity to make my colleagues aware that we have, in fact, addressed the concerns raised about constitutionality.

The judge additur provision, coupled with the modification that strikes the defendant's right to a new trial, is a constitutional provision. Again, some of my colleagues on the other side of the aisle would like to add additional language which makes this particular provision severable, to make absolutely certain that the constitutionality of this bill will not be tested as a result of this provision.

I have assured them, based upon my conversations with the Department of Justice and others, that their extra cautious approach is not required.

In concluding, I cannot remember in the 10 years that I have been in the Senate where the two managers of different political persuasions have publicly said that they are so committed to rectifying something which is of concern to the Senator from South Carolina, to some of my colleagues, and to the White House; that the Senator from Washington has said, ''We will not come back from the conference with these provisions;'' and where the Senator from Washington this morning at a public press conference said that he would vote against the motion to invoke cloture, assuming that the conference report was filibustered. I share exactly that same view.

I think that is pretty strong and dealing in good faith. We would like to hope that we can be dealt with in good faith also.

Mr. President, I thank the presiding officer. I yield the floor.

Mr. MCCONNELL. Will the manager of the bill, Senator GORTON, yield for a question about a particular section of the bill?

Mr. GORTON. Yes, I would be glad to do so.

Mr. MCCONNELL. I thank the Senator. The bill, at section 106, sets out a provision to hold individuals who misuse or alter a product accountable for any injury resulting from the misuse or alteration. This provision would allow for the reduction of damages based on such misuse or alteration.

This section, at 106(b), also provides that this provision only supersedes State laws that do not already impose such apportioning of damages among responsible parties, including the injured party found to have misused or altered the product, is that not correct?

Mr. GORTON. That is correct.

Mr. MCCONNELL. But, this apportioning of damages would only occur if the court has found the defendant liable for at least some portion of the plaintiff's injuries. In other words, if, under State law, the defendant has no liability, for example under the ''common knowledge'' doctrine, then this provision would not change that result. Am I reading this section correctly?

Mr. GORTON. Indeed. Under the ''common knowledge'' doctrine the defendant is not held responsible for injuries to the plaintiff caused by the plaintiff's misuse of a product that is commonly known and recognized to be dangerous by ordinary users.

Mr. MCCONNELL. So, the Senator shares my understanding that this bill would not overturn the result in, for example, *Friar* v. *Caterpillar, Inc.*, (539 So. 2d 509, La. App. 5th Cir., 1988) or *Colson* v. *Allied Products Corp.* (640 F.2d 5, 1981)? Those both involved situations in which the plaintiffs were injured using products that the courts found presented a danger of which plaintiffs were aware.

Mr. GORTON. Yes. The Friar case involved a forklift and the Colson case involved the use of a lawnmower. In

both of those cases the courts held there was no duty to warn where the dangers are of common knowledge.

Mr. MCCONNELL. This basic principle is part of case law and it is also set forth in the Restatement of Torts, at section 402A, which I would like to include in the RECORD. The relevant part provides that defendants

> Are not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages, are an example, as are also those foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

I thank my colleague for responding to my inquiries.

Mr. GORTON. I am glad we clarified the meaning of section 106.

Mr. HOLLINGS. Mr. President, I have been at the Budget Committee all afternoon, and so I have not been able to monitor all the nuances, but we are now hearing that reasoned objections need not be given to this provision because the distinguished Senators say that they are going to take care of this issue in conference.

That could be. I have served on many a conference committee and I have learned that you are never able really to control it. Each Senator is given a vote, along with the House Members.

Be that as it may, I will not give the reasons why I am concerned about this provision at this particular time, other than to say that I am also honestly objecting. I am courteously objecting. I do not know how to say it any better than that.

When the proponents make a request, a unanimous-consent request, and assume that theirs is the only honest request, courteous request, and sincere request, and how they can be more honest, then that constrains me to stand and say that I am just as courteously objecting and honestly objecting as I know how to object. And I object.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The majority leader is recognized.

UNANIMOUS CONSENT AGREEMENTS

Mr. DOLE. Mr. President, I ask unanimous consent that notwithstanding rule XXII, that the following amendments be the only remaining amendments in order to H.R. 956, and not be in order after the hour of 11 o'clock a.m. on Wednesday: Harkin, punitive damages; Boxer, harm to women; Dorgan, punitive cap; Heflin-Shelby, Alabama wrongful death cases; Heflin, punitive damage insurance.

I ask unanimous consent that the vote occur in relation to the Shelby-Heflin amendment number 693 at 9:45 a.m. on Wednesday, to be followed by a vote on or in relation to the Harkin amendment.

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

Mr. DOLE. I further ask that following the disposition of the above listed votes, if no other Senator on the list is seeking recognition to offer their amendment, the Senate proceed to the adoption of the Coverdell-Dole substitute, as amended, the Gorton substitute, and the bill be advanced to third reading without any intervening action or debate.

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

Mr. DOLE. I further ask that following third reading, the following Members be recognized for the following allotted times, to be followed immediately by a vote on H.R. 956, as amended:

Senator HEFLIN, followed by Senator ROCKEFELLER, 15 minutes each; followed by Senator GORTON, 15 minutes; followed by Senator HOLLINGS, 15 minutes; and followed by Senator LEVIN, 10 minutes.

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

ORDER TO PROCEED TO S. 534

Mr. DOLE. Mr. President, I ask unanimous consent, and this has been cleared by the Democratic leader, at 12 noon on Wednesday, May 10, the Senate proceed to calendar 74, S. 534, the Solid Waste Disposal Act.

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

Mr. DOLE. Mr. President, I think Senator HARKIN plans to offer his amendment in about 20 minutes, at 7 o'clock. I am not certain whether the amendments by Senator BOXER or DORGAN will be offered.

We have the agreement, in any event. I want to thank my colleagues on both sides of the aisle. This means no more votes tonight. We can alert our colleagues but there will be debate on the Harkin amendment, and I assume other amendments if they want to be called up. I thank the Chair.

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. ABRAHAM. 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. ABRAHAM. I thank the Chair.

Mr. President, I rise this evening in support of the product liability reform bill now under consideration, and I would like to just preface my remarks by offering my compliments to the bill's managers for their tenacity in sticking with this process as we have moved through all the various perspectives to find a point of common agreement between 60 Members of the Senate. I think both Senator ROCKEFELLER and Senator GORTON worked very effectively on this product liability reform effort.

I believe the bill represents an excellent start at reforming our civil justice system, a system that eats up over $300 billion a year in legal and court costs, awards, and litigants' lost time, not to mention the loss to consumers and the economy from higher prices for products, innovations and improvements not on the market, and unnecessarily high insurance costs.

By placing reasonable limitations on punitive damages in product liability suits, this legislation will begin the process of reforming our litigation lottery without harming anyone's right to recover for damages suffered.

I am especially pleased that the bill now includes a special provision limiting punitive damages for individuals with assets of less than $500,000 and for small businesses with fewer than 25 employees. This provision is modeled on a proposal that Senator DEWINE and I cosponsored and provides that the maximum award against such individuals or entities is the lesser of $250,000 or twice compensatory damages.

Mr. President, no one benefits when businesses go bankrupt because of arbitrary punitive damage awards. Small businesses are particularly susceptible to such problems as are the millions of Americans employed by them.

The bill will also eliminate joint liability for noneconomic damages in product liability cases. Thus the bill would end the costly and unjust practice of making a company pay for all damages when it is only responsible for, say, 20 percent just because the other defendants are somehow judgment proof.

The bill would replace the outmoded joint liability doctrine with proportionate fault in which each defendant would have to pay only the amount necessary to cover the damage for which he or she was responsible.

The bill also creates some important limitations on the liability of sellers of products generally as well as on the liability of suppliers of raw materials critical to the production of lifesaving medical devices.

These provisions go a good way toward restoring individual responsibility as the cornerstone of tort law. They also recognize an important fact about our legal system. Ultimately, in its current form, it is profoundly anticonsumer. By raising the prices of many important goods, our legal system makes them unavailable to poor individuals who cannot afford them when an exorbitant tort tax has been added. And in extreme cases our legal system can literally lead to death or misery by driving off the market drugs that, if properly used, can cure terrible but rare diseases or medical devices for which raw materials are unavailable on account of liability risks.

These are important reforms, Mr. President; reforms that will increase product availability, decrease prices and save jobs.